Land and Environment Court

New South Wales

Case Name:	Denman Aberdeen Muswellbrook Scone Healthy Environment Group Incorporated (INC2200560) v MACH Energy Australia Pty Ltd and Anor
Medium Neutral Citation:	[2024] NSWLEC 86
Hearing Date(s):	7 to 10 November 2023
Date of Orders:	9 September 2024
Decision Date:	19 August 2024
Jurisdiction:	Class 4
Before:	Robson J
Decision:	See orders at [253] and [254]
Catchwords:	JUDICIAL REVIEW — Challenge to the grant of a development consent by the Independent Planning Commission ('Commission') for an extension of an existing coal mine — Whether failure to consider mandatory considerations — Whether failure to consider specific conditions aimed at minimising to the greatest extent possible greenhouse gas emissions — Whether failure to consider cl 2.20(1) of the State Environmental Planning Policy (Resources and Energy) 2021 — Whether failure to assess downstream (Scope 3) emissions — Whether failure to consider likely impacts of downstream (Scope 3) emissions — Whether engaged in irrational or illogical form of reasoning when proceeding on the basis that "accounting" of Scope 3 emissions will be undertaken by the downstream consumer country — Whether failure to consider likely impacts of Scope 3 emissions in its assessment of public interest — Whether engaged in illogical or irrational form of reasoning when stating that, without the conditions that have been imposed on

	the development consent, the development proposal would warrant refusal — Whether conditions imposed were merely hypothetical — Whether failure to consider submissions in relation to climate change impacts — Whether misconstruction of s 4.63(3)(a) of the Environmental Planning and Assessment Act 1979 (NSW) when determining what would have been carried out but for the surrender of the existing consent — Whether deferred or delegated consideration of impact of proposed development on newly discovered species of lizard — Whether failure to adhere to standard of reasonableness when assessing air quality impact and social impact — Amended summons dismissed
Legislation Cited:	Biodiversity Conservation Act 2016 (NSW) Environment Protection and Biodiversity Conservation Act 1999 (Cth) Environmental Planning and Assessment Act 1979 (NSW), Pt 4, Div 4.7, ss 2.9, 4,15, 4.17, 4.36, 4.38, 4.40, 4.50, 4.63, Sch 1, Pt 1, cl 20 Land and Environment Court Rules 2007 (NSW), r 4.2 State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007, cl 14 State Environmental Planning Policy (Resources and Energy) 2021, cl 2.20
Cases Cited:	ABT17 v Minister for Immigration and Border Protection (2020) 269 CLR 439; [2020] HCA 34 Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs (2003) 236 FCR 593; [2003] FCAFC 184 Barrington - Gloucester - Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure [2012] NSWLEC 197; (2012) 194 LGERA 113 Bunderra Holdings Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement) (2017) 96 NSWLR 434; [2017] NSWCA 263 Bushfire Survivors for Climate Action Incorporated v Narrabri Coal Operations Pty Ltd [2023] NSWLEC 69 Ceerose Pty Ltd v A-Civil Aust Pty Ltd (2023) 112 NSWLR 225; [2023] NSWCA 215 DVO16 v Minister for Immigration and Border

Protection (2021) 273 CLR 177; [2021] HCA 12
Foster v Minister for Customs and Justice (2000) 200 CLR 442; [2000] HCA 38
Gloucester Resources Ltd v Minister for Planning [2019] NSWLEC 7; (2019) 234 LGERA 257
Kepco Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc [2021] NSWCA 216
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40
Minister for Immigration and Border Protection v Stretton (2016) 237 FCR 1; [2016] FCAFC 11
Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421; [2019] HCA 3
Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541; [2018] HCA 30
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16
Minister for Planning v Walker [2008] NSWCA 224; (2008) 161 LGERA 423
Minister for the Environment v Sharma (2022) 291 FCR 311; [2022] FCAFC 35
Mison v Randwick Municipal Council (1991) 23 NSWLR 734; (1991) 73 LGRA 349
Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd [2021] NSWLEC 110; (2021) 252 LGERA 221
Parramatta City Council v Hale (1982) 47 LGRA 319
Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2) [2008] FCA 1521; (2008) 162 LGERA 154
Plaintiff M1/2021 v Minister for Home Affairs (2022) 275 CLR 582; [2022] HCA 17
Singh v Minister for Home Affairs (2019) 267 FCR 200; [2019] FCAFC 3
Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd [2018] NSWCCA 202; (2018) 362 ALR 359
South East Forest Rescue Incorporated v Bega Valley Shire Council and South East Fibre Exports Pty Ltd [2011] NSWLEC 250; (2011) 211 LGERA 1
The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379; [2012] HCA

	36 Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited [2008] NSWLEC 185; (2008) 160 LGERA 20 Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc (2014) 86 NSWLR 527; [2014] NSWCA 105 Westfield Management Limited v Perpetual Trustee Company Limited [2006] NSWCA 245 Zhang v Canterbury City Council (2001) 51 NSWLR 589; [2001] NSWCA 167
Category:	Principal judgment
Parties:	Denman Aberdeen Muswellbrook Scone Healthy Environment Group Incorporated (INC2200560) (Applicant) MACH Energy Australia Pty Ltd (First Respondent) Independent Planning Commission of NSW (Second Respondent)
Representation:	Counsel: N L Sharp SC with L Sims and M Thompson (Applicant) S J Free SC with D Hume (First Respondent) Submitting appearance (Second Respondent) Solicitors: Environmental Defenders Office Ltd (Applicant) Ashurst Australia (First Respondent) NSW Department of Planning and Environment (Second Respondent)
File Number(s):	2022/00367759
Publication Restriction:	Nil

JUDGMENT

Introduction and outcome

1 The Denman Aberdeen Muswellbrook Scone Healthy Environment Group Incorporated ('DAMSHEG') has brought Class 4 judicial review proceedings challenging the determination of the Independent Planning Commission of NSW ('Commission') on 6 September 2022 ('decision') to grant development consent to the Mount Pleasant Optimisation Project ('Project'). The Project

involves the extension of the life of the Mount Pleasant Coal Mine ('mine') which is an established open cut coal mine operated by MACH Energy Australia Pty Ltd ('MACH') under an existing development consent within the Upper Hunter Valley, approximately 3km north-west of Muswellbrook. The decision was made pursuant to s 4.38(1) of the *Environmental Planning and Assessment Act 1979* (NSW) ('EPA Act').

2 The Commission, as consent authority, filed a submitting appearance and MACH was the active respondent.

3 DAMSHEG seeks a declaration that the Commission's decision to grant development consent is invalid and advances eight (somewhat overlapping) grounds. As will be seen, Grounds 1 to 5 essentially concern the Commission's treatment of greenhouse gas emissions, in particular, Scope 3 emissions, and raise errors of statutory construction, failure to consider mandatory considerations, and irrational or illogical forms of reasoning. Grounds 6, 7 and 8 concern the Commission's treatment of biodiversity, air quality, health and social impacts.

4 Although these proceedings raise matters of the utmost public interest, and while there is no doubt that the continuation of coal mining will contribute to the global total of greenhouse gas concentrations which affects the climate system and causes climate change impacts, the jurisdiction of this Court in these judicial review proceedings is confined to ensuring that the Commission carried out its functions in accordance with the statutory provisions that govern the performance of those functions and exercise of the relevant powers. It is not the function of this Court to undertake merits review of the Commission's findings. This is a fundamental principle that will be reiterated throughout this judgment.

5 For the reasons that follow, I find that DAMSHEG has not established any of the grounds of review of the Commission's decision to grant development consent to the Project and the amended summons filed 30 October 2023 should be dismissed.

Background

6 The following background facts are uncontentious. Further facts will be noted in my consideration of the evidence and the parties' submissions.

7 Development consent was originally granted for the construction and operation of an open cut coal mine at Mount Pleasant on 22 December 1999 and has been the subject of five modifications, with the most recent modification granted on 29 June 2022 ('existing consent'). MACH purchased the coal mine in 2016 and commenced mining operations in 2018.

8 The existing consent (as modified) authorises the extraction of up to 10.5 million tonnes per annum ('Mtpa') of run-of-mine ('ROM') coal until 22 December 2026 and provides for the development and operation of a range of ancillary infrastructure including a coal handling and preparation plant, a rail loop and spur, and a conveyor and load-out facility to transport coal by rail to the Port of Newcastle.

9 On 19 January 2021, MACH lodged a State significant development ('SSD') application ('SSD 10418') seeking to extend the life of the mine by 22 years to 22 December 2048. The extension of the operations of the existing mine would enable the extraction of an additional 406 Mt of ROM coal (allowing for a total of approximately 444 Mt of ROM coal over the extended life of the mine) by deepening part of the open cut mining area and increasing the mine's peak annual production rate from 10.5 Mtpa to 21 Mtpa of ROM coal.

10 On 22 January 2021, MACH lodged an environmental impact statement ('EIS') with the Department of Planning and Environment ('Department'). SSD 10418 and the EIS were publicly exhibited between 3 February 2021 and 17 March 2021.

11 On 9 September 2021, the Minister for Planning and Public Spaces made a request under s 2.9(1)(d) of the EPA Act for the Commission to conduct a public hearing into the Project. On 31 May 2022, the Department submitted its Assessment Report ('Department AR') to the Commission. The Department AR concluded that, subject to the adoption of its recommended conditions, on balance, the benefits of the Project outweigh its impacts, and that the proposed development was "approvable".

12 On 1 June 2022, the Department finalised its whole-of-government assessment and referred SSD 10418 to the Commission for determination and a public hearing was held by the Commission on 7 and 8 July 2022. At the public hearing, the Commission heard from community members and various parties, and received extensive and detailed submissions (including approximately 1,000 written submissions and 49 oral presentations including submissions made by DAMSHEG's legal representative and one of DAMSHEG's experts, Prof Penny Sackett).

13 In addition to providing expert reports from a number of researchers and scientists, including Prof Sackett, Nicki Hutley, Dr Hedda Askland, Dr Gabriel da Silva and Simon Nicholas, DAMSHEG later provided the Commission with further written submissions and a number of recent publications of national and international research bodies in relation to greenhouse gas emissions.

14 From 23 to 30 August 2022, the Commission reopened public submissions in response to new material received by the Department regarding a newly differentiated (and potentially endangered) species of *Delma vescolineata* ('Legless Lizard') being recorded at the site of the mine. The Commission received a further 52 submissions in relation to the Legless Lizard.

15 On 6 September 2022, the Commission determined SSD 10418 by granting development consent subject to conditions and published a "Statement of Reasons for Decision" ('Reasons').

16 These reasons for judgment are structured as follows. First, I will outline the grounds of review raised by DAMSHEG. Then I will briefly note the statutory framework for the Commission's decision and legal principles that I am to apply in relation to a number of the grounds. I will then summarise the salient background facts which are largely uncontentious, with emphasis upon the evidentiary material before the Commission, and provide some explication of the Reasons before considering each of the grounds. I will deal with further facts in my consideration of the parties' submissions. While there is some obvious overlap between a number of DAMSHEG's grounds, given the manner in which the parties have presented their arguments, it is necessary to deal

with each ground seriatim, which involves some unavoidable repetition in my consideration.

Grounds of review

17 In its amended summons filed 30 October 2023, DAMSHEG seeks declaratory and consequential relief and contends that the decision to grant development consent to the Project is invalid on eight grounds:

(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 State Environmental Planning Policy (Resources and Energy) 2021 ('Resources SEPP'); 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 ('Ground 1 – Resources SEPP Ground').

(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 and/or engaged in an irrational and illogical form of reasoning by proceeding on the basis that the "accounting" of the Scope 3 emissions by the downstream consumer country obviated the need to consider the impacts of those emissions ('Ground 2 – Likely Impacts Ground').

(3) The Commission failed to consider the likely impacts of Scope 3 emissions in its assessment of the public interest as required by s 4.15(1)(e) of the EPA Act (thereby failing to take account of this relevant consideration), or alternatively, engaged in an irrational and illogical form of reasoning with regard to the public interest by proceeding on the basis that the "accounting" of Scope 3 emissions by the downstream consumer country obviated the need to consider the environmental, social and economic impacts of those emissions ('Ground 3 – Public Interest Ground').

(4) In assessing the public interest as required by s 4.15(1)(e) of the EPA Act, the Commission engaged in an irrational and illogical form of reasoning by first stating that in the absence of conditions being imposed, the predicted negative impacts of the Project would warrant refusal, and thereafter granting approval together with conditions in

relation to Scope 1 and Scope 2 emissions that were merely a hypothetical means of reducing those emissions because those conditions imposed aspirational targets (or were based on hypothesised future technology) rather than binding obligations ('Ground 4 – Conditions of Approval Ground').

(5) The Commission failed to consider DAMSHEG's submissions and specific accompanying expert reports in relation to the effect of the Scope 3 emissions of the Project and the global carbon budget, and thereby failed to consider a mandatory consideration specified in s 4.15(1)(d) (this ground was particularised by reference to the expert reports of Prof Sackett, Ms Hutley and Mr Nicholas) ('Ground 5 – Public Submissions Ground').

(6) The Commission erred in its construction and application of s 4.63(3)(a) of the EPA Act by failing to determine what development "could have been carried out but for the surrender of the [pre-existing development] consent" and consequently failed to consider the impacts of vegetation clearing on biodiversity within parts of the site where vegetation clearing could not have been carried out under the pre-existing development consent ('Ground 6 – Surrender of Consent Ground').

(7) The Commission constructively failed to exercise its statutory power under s 4.15(1)(b) of the EPA Act by deferring and delegating for later consideration the impacts of the proposed development on the Legless Lizard ('Ground 7 – Lizard Ground').

(8) The Commission failed to adhere to the standard of reasonableness when reaching its conclusions, first, that the air quality impacts of the Project could be adequately minimised, managed or compensated to achieve an acceptable level of environmental performance; and second, that the Project will have no significant social impacts ('Ground 8 – Air Quality Ground').

Statutory framework

18 The Project is development of a class declared to be SSD under s 4.36 of the EPA Act and the decision was made under s 4.38(1) of the EPA Act which provides that the consent authority (here, the Commission, under s 4.5(a) of the EPA Act) is:

> "… to determine a development application in respect of State significant development by—
>
> (a) granting consent to the application with such modifications of the proposed development or on such conditions as the consent authority may determine, or
>
> (b) refusing consent to the application.
>
> …"

19 Section 4.40 of the EPA Act provides that the evaluation of a development application for SSD is set out in s 4.15 of the EPA Act and, as such, a consent authority, is required to take into consideration the matters in s 4.15(1) as are of relevance to the proposed development.

20 For present purposes, the matters of relevance to the Project include the provisions of any environmental planning instrument ('EPI') (s 4.15(1)(a)(i)), such as the Resources SEPP (in particular cl 2.20); the likely impacts of the Project, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality (s 4.15(1)(b)); any submissions made in accordance with the EPA Act or the regulations (s 4.15(1)(d)); and the public interest (s 4.15(1)(e)).

21 Part of DAMSHEG's challenge (in relation to Ground 1 – Resources SEPP Ground) relates to the Commission's failure to consider matters it was required to consider under cl 2.20 of the Resources SEPP, which relevantly 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—
>
> …
>
> (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.

Some legal principles

22 I remain conscious that the Court is engaged in judicial review and not merits review, and that the Court is primarily concerned with what the decision-maker, the Commission, did, in arriving at its decision. The role of the Court in judicial review is "to assess the quality of the administrative decision by reference to

the statutory source of the power exercised in making the decision" (*Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30 ('*SZVFW*') at [79] (Nettle and Gordon JJ)) and the factual information before the decision-maker: *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; [2016] FCAFC 11 ('*Stretton*') at [7]-[13] (Allsop CJ). Noting that DAMSHEG raises concerns regarding the Commission's failure to take into account mandatory considerations (including matters in cl 2.20 of the Resources SEPP, and in s 4.15(1)(a)(i), (b), (d) and (e) of the EPA Act) in Grounds 1, 2, 3, 5, 6 and 7, and legal unreasonableness in various guises (namely irrational and illogical forms of reasoning) in Grounds 2, 3, 4 and 8, it is appropriate to summarise some relevant legal principles about which there was no apparent disagreement between the parties. Some further elucidation of legal principles will be undertaken in the consideration of the grounds.

Mandatory considerations (Grounds 1, 2, 3, 5, 6 and 7)

23 Whether a consideration is mandatory is a matter of statutory construction. A consideration may be a mandatory consideration by way of implication, taking into account the subject matter, scope and purpose of the relevant statute: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 115 (Mason J); [1986] HCA 40 ('*Peko-Wallsend*').

24 The duty imposed by s 4.15(1) of the EPA Act is, in terms, a duty to take the identified matters "into consideration" as they are "of relevance to the development". As the duty is a duty "to consider", a challenge based on an alleged failure to consider "should not be turned into an assessment of the adequacy of the consideration accorded [by the decision-maker] in a particular case" and must not be framed in a way which "encourage[s] a slide into impermissible merit review": *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 at [35] (Hodgson JA).

25 In *Foster v Minister for Customs and Justice* (2000) 200 CLR 442; [2000] HCA 38 at [23], Gleeson CJ and McHugh J observed that when applying the principles regarding mandatory considerations it may be "significant" to consider the "level of particularity" with which a matter is said to be implicit in a statutory scheme. Moreover, a duty to consider a matter does not carry with it

a duty to "refer to every piece of evidence and every contention made" in respect of that subject matter: *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593; [2003] FCAFC 184 at [46] (French, Sackville and Hely JJ).

26 The concept of consideration is not obscure and the duty to "consider" has been given an extensive history of judicial exegesis: *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* (2023) 112 NSWLR 225; [2023] NSWCA 215 ('*Ceerose*') at [54] (Payne JA). It is trite to note that caution has been suggested by the High Court in relation to the use of labels such as "active intellectual process" and/or "proper, genuine and realistic consideration" as there is a risk that the use of labels can readily shade into claims about arguments having been resolved incorrectly because such claims were misunderstood or not really grappled with, which tends towards merit review: *Ceerose* at [57].

27 In my consideration to follow, I am conscious that it is for DAMSHEG to establish that the Commission had not engaged in a consideration of what was required to be considered. In making my findings, I accept that the Reasons are a comprehensive statement of the Commission's approach and that the Commission was not required to recite all evidence and all submissions before it in its Reasons and that it is necessary to read the Reasons in the light of the whole case that was before the Commission. I am also conscious that although cl 20(2)(c) in Pt 1 of Sch 1 to the EPA Act requires the Commission to give public notification of its "reasons for decision", the content or level of detail in its reasons is not prescribed.

Legal unreasonableness (Grounds 2, 3, 4 and 8)

28 The power given by s 4.38 of the EPA Act is subject to the requirement of legal reasonableness and the statutory text, context and purpose of s 4.38 informs the reasonableness inquiry: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 ('*Li*') at [23], [24], [63], [90] (French CJ, Hayne, Kiefel, Bell and Gageler JJ); *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 at [11] (Bell, Gageler, and Keane JJ). The question for the Court is not whether it thinks the decision is reasonable or appropriate but to "evaluate the quality of the decision, by

reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful": *Stretton* at [12].

29 The standard of reasonableness is not confined to why a statutory decision is made but extends to *how* a decision is made, which can be assessed through examining the reasoning process by which the decision-maker arrived at the exercise of power: *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439; [2020] HCA 34 at [19] (Kiefel CJ, Bell, Gageler and Keane JJ) citing *Li* at [91]; *Singh v Minister for Home Affairs* (2019) 267 FCR 200; [2019] FCAFC 3 ('*Singh*') at [44]-[47] (Reeves, O'Callaghan and Thawley JJ).

30 Where reasons for a decision are provided, as in the case here, they are the focal point for the assessment of legal unreasonableness: *SZVFW* at [84]; *Singh* at [47].

31 Simply stated, the decision cannot be "so devoid of plausible justification that no reasonable person could have taken that course" (*Li* at [91]), and the decision should not lack rational foundation, be "plainly unjust, arbitrary, capricious or [lack] common sense having regard to the terms, scope and purpose of the statutory source of the power" such that it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Stretton* at [11]; *SZVFW* at [82].

32 I remain conscious that legal unreasonableness also requires the Court to acknowledge that there is "an area of decisional freedom" vested in the decision-maker within which reasonable minds may differ in exercising statutory discretionary power: *Li* at [28]. In the present case, the decisional freedom afforded to the Commission under s 4.38 of the EPA Act is discretionary in nature and the matters identified in s 4.15 (which apply to decisions under ss 4.38 and 4.40) are not exhaustive, nor are they ordered or ranked, and it is for the Commission to determine the weight that each matter carries in the outcome of its decision: *Bushfire Survivors for Climate Action Incorporated v Narrabri Coal Operations Pty Ltd* [2023] NSWLEC 69 ('*Bushfire Survivors'*) at [120], [121], [122], [124] (Duggan J).

The Commission's consideration of the Project

33 As Grounds 1 to 5 concern challenges to the Commission's consideration and treatment of greenhouse gas emissions, and Grounds 6, 7 and 8 relate to the Commission's consideration and treatment of biodiversity, and moreover, that the Commission's consideration of various matters miscarried, an understanding of the material before it, and the manner in which the Commission considered that material as expressed in its Reasons, provide context for consideration of the parties' submissions.

34 The Commission was obliged by cl 2.20(2)(c) in Pt 1 of Sch 1 to the EPA Act to give reasons for its decision. The Reasons are extensive, comprising 50 pages and 295 paragraphs presented in parts with, relevantly, Part 2 detailing the application, Part 3 detailing the Commission's consideration, Part 4 detailing community participation and public submissions, Part 5 detailing key issues including air quality, greenhouse gas emissions, biodiversity and social impacts, and others; and Part 6 detailing the Commission's findings and determination. The following precis, whilst lengthy, is not exhaustive and discrete aspects of the Reasons will be further noted in my consideration of the various grounds.

35 At the outset of the Reasons, the Commission provides a description of the existing mining operations and lists the extensive material that it considered. The Commission then details the strategic and statutory context of the Project.

36 Under the heading "Mandatory Considerations", the Commission lists the matters it was required to consider pursuant to s 4.15(1) of the EPA Act (with commentary) in a tabular form under headings including the "Relevant EPI's"; "Relevant development control plans"; Likely Impacts of the Development"; "Suitability of the Site for Development"; "Objects of the EP&A Act"; and "The Public Interest (including Ecologically Sustainable Development (ESD))". Under the heading "Additional Considerations", the Commission notes that it considered, relevantly, the United Nations Framework Convention on Climate Change (UNFCCC) *Paris Agreement 2015* ('Paris Agreement'); *Australia's Long-Term Emissions Reduction Plan* ('Emissions Reduction Plan'); the NSW Net Zero Plan Stage 1: 2020-2030 and its implementation plan ('Net Zero

Plan'); and the NSW Climate Change Policy Framework ('CCPF'), along with several other policies, guidelines and plans.

37 The Commission then records, under the heading "Community Participation and Public Submissions", its conduct, including various meetings with interested parties and site inspections; the receipt of further information; the public hearing on 7 and 8 July 2022; and then briefly notes submissions received from Muswellbrook Shire Council and Upper Hunter Shire Council. The Commission then refers in detail to the Department AR.

38 The Commission then provides an analysis of the public submissions received and records that the "Key Issues Raised" include "Greenhouse gas emissions and climate change"; "Air quality"; "Noise impacts"; "Socio-economic"; "Aboriginal and Historic Heritage"; and "Biodiversity and rehabilitation"; "Water"; "Visual"; and "Other", and notes that the majority of the submissions received related to three topics – economy and socio-economic (67%); air quality and emissions (17%); and climate change (9%). The Commission then records the further material received in relation to the Legless Lizard.

39 In Part 5 of its Reasons, under the heading "Air Quality", the Commission notes (at par (110)), that the key air quality issues for the Project are associated with dust from general mining activities, fume from blasting activities and emissions from machinery exhausts. The Commission then lists the expert reports it considered in relation to air quality impacts including: Air Quality Impact Assessment dated 16 December 2020; Air Quality and GHG Peer Review dated 13 January 2021; Supplementary Air Quality Advice dated 1 July 2021; Response to Air Quality Peer Review dated 21 December 2021; and Supplementary Air Quality Peer Review dated 16 March 2022 (all prepared for MACH); Independent Peer Review dated 4 February 2022; and Independent Peer Review Final Response dated 31 March 2022 (prepared by/for the Department).

40 The Commission then summarises its conclusions from the air quality assessment material including the finding (as provided for in the Department AR), that the impacts of the Project could be adequately minimised, managed or at least compensated to achieve an acceptable level of environmental

performance and imposes various conditions setting air quality criteria, acquisition rights as well as proactive and reactive mitigation measures (at pars (121)-(124)).

41 To provide context to the parties' submissions (and the overlapping matters raised in Grounds 1 to 5 and 8 in relation to greenhouse gas emissions and air quality), it is convenient to provide the following (somewhat lengthy) extract from the Reasons under the headings "Air Quality" and "Greenhouse Gas Emissions", to which there will be significant reference later in this judgment.

> "**Commission's Findings**
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> 119. The Commission notes the objections to the Project received on the basis of air quality impacts, particularly in the context of the ambient Upper Hunter air quality and with respect to the potential impact on equine health.
>
> 120. The Commission is of the view that the potential air quality impacts of the Project have been adequately assessed and has imposed conditions requiring mitigation and management of these impacts. The Commission agrees with the Department and recognises that although the proposed impacts are similar to those of the Existing Approval, the impacts would be extended due to the Project's extended operation period - up to 22 December 2048.
>
> 121. The Commission is satisfied that the Applicant has adequately addressed the EPA's requirements for dust-making operations through the proposed proactive and reactive measures, noting that this includes shut down requirements, to manage particulate emissions and impacts at the affected receptors. The Commission finds that the impacts of the Project can be adequately minimised, managed or at least compensated to achieve an acceptable level of environmental performance.
>
> 122. The Commission has therefore imposed conditions B28 to B30 which set specific air quality criteria for the Project. The Commission has also imposed Condition B31 which sets out air quality and GHG operating conditions for the Project. Condition B31(c) requires the Applicant to implement both proactive and reactive air quality mitigation measures to ensure compliance with the relevant conditions of consent. The Commission notes that the applicable criteria may be exceeded at 13 receivers and one land parcel as a result of the Project and that these are afforded acquisition rights under the VLAMP. The Commission has therefore imposed conditions C1 and C12 to C19 which set out the land acquisition requirements for these receivers.
>
> 123. The Commission agrees with the EPA's advice described above (paragraph 117) and has imposed Condition D11 which requires the Applicant to report on the effectiveness of air quality management systems including a review of the reactive management measures implemented at the Site. The Applicant must also describe what measures will be implemented over the next calendar year to improve the environmental performance of the development.

124. Condition B32 imposed by the Commission requires the Applicant to prepare an Air Quality and Greenhouse Gas Management Plan (AQGGMP) in consultation with CAS (Climate and Atmospheric Science) and the EPA. The AQGGMP must set out measures to be implemented to ensure compliance with the air quality criteria. The AQGGMP must also include an air quality monitoring program, undertaken in accordance with the Approved Methods. The Applicant must implement the AQGGMP as approved by the Planning Secretary.

5.3 Greenhouse Gas Emissions

125. GHG emissions are generally categorised into three different types and are described by the Clean Energy Regulator as follows:

- Scope 1: emissions released to the atmosphere as a direct result of an activity, or series of activities, at a facility level;
- Scope 2: emissions released to the atmosphere from the indirect consumption of an energy commodity. For example, emissions from the generation of purchased energy electricity, heat and steam used by a facility; and
- 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.

International

126. Australia is a signatory to the UNFCCC Paris Agreement, which requires signatories to identify actions to cut emissions, and under this agreement Australia has committed to reduce national GHG emissions by 2030. These actions are referred to as a Nationally Determined Contribution (NDC). The UNFCCC and related articles specify that all emissions associated with an activity within Australia's border count towards Australia's total emissions.

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.

National

128. The National Greenhouse and Energy Reporting Scheme (NGERS) is a national framework for reporting on energy production, consumption and emissions by major emitters and State of origin and has been designed to support the Government's international reporting obligations. The Commission notes that NGERS does not require the reporting of Scope 3 emissions.

129. The previous Commonwealth Government developed the Emissions Reduction Plan which is a whole-of-economy plan to achieve net zero GHG emissions by 2050. The Emissions Reduction Plan describes a "technology-led" plan that aims to "reduce the cost of low emissions technologies, accelerate their deployment at scale, and position our economy to take advantage of new and traditional markets". The Emissions Reduction Plan acknowledges that "Reducing emissions across these sectors [industry, mining and manufacturing] will require a range of new and bespoke technologies" and

focuses on investing in technologies to help reduce and abate GHG emissions.

130. The Commission notes that the current Commonwealth Government has committed to legislating a 43% reduction in GHG emissions by 2030.

State

131. The Commission notes that the national and State policy settings relating to climate change and GHG emissions are rapidly changing. Section 3.2 of the Department's AR identifies that there is now a range of NSW climate change policy and guidance relevant to the regulation of GHG emissions, including:

- a target of net zero emissions by 2050;
- a reduction of approximately 50% emissions by 2030 (against a 2005 baseline); and
- a focus on limiting fugitive emissions from coal mining (fugitive emissions of the methane contained in underground coal seams occurs when the coal is mined) (AR para 35).

132. The CCPF aims to "Maximise the economic, social and environmental wellbeing of NSW in the context of a changing climate and current and emerging international and national policy settings and actions to address climate change". Under the CCPF, the NSW Government's objective is to achieve net-zero emissions by 2050 and for NSW to be more resilient to a changing climate.

133. In January 2020, the NSW Government entered into the NSW Energy Package MOU with the Commonwealth Government which aimed at, in part, achieving emissions reductions. The NSW Energy Package MOU sets out an agreement that the Commonwealth will contribute funds to certain initiatives, including the Emissions Intensity Reduction Fund which is aimed at transitioning to low emissions solutions.

134. In 2008 the NSW Government established the Coal Innovation Fund. "The Fund's purpose is to support research, development and the demonstration of low emissions coal technologies for future commercial application. It also aims to increase public awareness of the importance of low emissions coal technologies in reducing greenhouse gas emissions." (Regional NSW). [Footnote omitted.]

135. In March 2020, the NSW Government released its *Net Zero Plan Stage 1: 2020-2030*, which was then updated in September 2021 with the Net Zero Plan. The Net Zero Plan identifies priorities and actions proposed in order to achieve a reduction in GHG levels by 2030.

136. According to the EPA, fugitive emissions from coal and gas make up approximately 9% of NSW's GHG emissions as of 2018-2019. Under the Net Zero Plan, limiting the fugitive emissions that come from coal mining is important to reduce the State's emissions, including capturing and combusting those emissions. The Net Zero Plan states: "Emissions reductions from the resources sector could provide a new revenue stream for mines, increase productivity, improve mine safety and improve air quality". The Net Zero Plan also acknowledges that methane released during coal mining is a potential energy source equal to all residential gas use in NSW each year.

137. In the NSW policy context, clause 2.20(1) of the Resources SEPP expressly requires the consent authority to consider:

> 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-
>
> > *that impacts on significant water resources, including surface and groundwater resources, are avoided, or are minimised to the greatest extent practicable,*
> >
> > *that impacts on threatened species and biodiversity, are avoided, or are minimised to the greatest extent practicable,*
> >
> > *that greenhouse gas emissions are minimised to the greatest extent practicable.*

138. Clause 2.20(2) of the Resources SEPP also requires the consent authority to consider:

> 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.

5.3.1 Project GHG Emissions

139. The Department's AR states that fugitive emissions from mining in NSW are a significant component of GHG emissions and account for approximately 9-10% of NSW emissions (AR para 191).

140. The Applicant's EIS was accompanied by a Greenhouse Gas Assessment (GHG Assessment), which included a Greenhouse Gas Calculations Report, dated 11 January 2021. An Air Quality and GHG Peer Review, dated 13 January 2021 was also submitted with the EIS. CAS Advice to the Department, dated 10 December 2021 (CAS Advice), stated that the emission estimates in the GHG Assessment were consistent with contemporary practice and emission factors. The CAS Advice stated that the GHG Assessment calculates fugitive emissions using a site-specific intensity factor based on Method 2 of the National Greenhouse and Energy Reporting Scheme (Measurement) Determination 2008, which according to CAS is the correct approach. However, in addition to the above, the CAS Advice set out points for improvement of the Applicant's GHG Assessment. The Applicant subsequently submitted a response to CAS, providing updated GHG calculations, dated 31 March 2022 (GHG Calculations).

141. The Department's AR sets out the estimated Scope 1, 2 and 3 emissions for the Project as shown in Table 4 below:

Table 4 – Estimated GHG Emissions from the Project (Source: Department's AR)

GHG	Estimated GHG Emissions (Mt CO2−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**

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 (AR para. 194).

Scope 1 and 2 Emissions

143. The anticipated further extraction of 406 Mt ROM coal is estimated to result in approximately 13.9 Mt carbon dioxide equivalent (CO2-e) total Scope 1 GHG emissions, with an average of 0.54 Mt CO2-e per year. The Commission understands the majority of these emissions are from diesel use, explosives, vegetation clearing and fugitive emissions. In relation to Scope 2 GHG emissions, the Project is estimated to result in approximately 2.17 Mt CO2-e total GHG emissions, with an average of 0.08 Mt CO2-e per year.

…

149. The Commission notes that, as depicted in Figure 4 below, the majority of estimated Project fugitive emissions are predicted to occur in the last 10-12 years of the Project's life (AR para 205, GHG Calculations pg 9). The Department's AR states that annual fugitive emissions are predicted to peak at around 0.55 Mt CO2-e in the 2040s before reducing to lower levels by the ending of mining (AR para 205). The Applicant has committed to continue to "periodically evaluate technological advancements in fugitive emission abatement technology and would implement additional reasonable and feasible fugitive greenhouse gas mitigation measures that may become available over the life of the Project" and is agreeable to require such a review as part of the AQGGMP (GHG Calculations pg 9, Response to Commission dated 28 June 2022 pg 6). In relation to Scope 2 GHG emissions, the Applicant has also committed to investigating whether it is reasonable and

feasible to reduce Scope 2 GHG emissions associated with on-site electricity use over the life of the Project.

…

Scope 3 Emissions

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.

156. The Commission notes that the majority of the Project's estimated fugitive emissions are predicted to occur in the last 10-12 years of the Project life (see paragraph 149 above). A high percentage of the Scope 1 GHG emissions of the Project are associated with fugitive emissions of methane. The Commission considers that 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 and to potentially derive a revenue stream through beneficial reuse of fugitive methane emissions.

157. The Commission accepts the Applicant's estimated GHG emissions from the Project as described by the Department's AR (AR Table 8) and as set out in Table 4 above. The Commission has set specific GHG performance measures for Scope 1 and Scope 2 emissions for the Project. Condition B36 imposed by the Commission requires the Applicant to comply with the following Scope 1 GHG emissions for the life of the Project (or lower emissions as determined under the AQGGMP):

- less than 0.87 million tonnes CO2-e emitted per calendar year;
- less than 0.80 million tonnes CO2-e emitted per calendar year (5-year rolling average); and
- less than 13.9 million tonnes CO2-e emitted over the life of the development.

158. The Commission has imposed condition B32 which requires the Applicant to prepare an AQGGMP for the Project in consultation with the CAS and EPA to the satisfaction of the Planning Secretary. The Commission has also imposed condition B36 which gives effect to the requirements set out in paragraph 157 above. Within 12 months of approval of the AQGGMP and then every 3 years during the life of mining operations (and any period of suspension of ROM coal extraction and/or processing), the AQGGMP must be updated to include a review of abatement technologies and feasibility of implementing any new, improved or best practice abatement options. As a requirement of the AQGGMP, the Applicant must describe measures that have regard to the outcomes of these investigations. As part of the AQGGMP, the Applicant must set out measures aimed at achieving, as soon as reasonably feasible but by 2034 at the latest a Scope 1 GHG emissions intensity of 0.028 tonnes of CO2-e emitted from the development per tonne of ROM coal, based on a 5 year rolling average by calendar year (condition B34(d)(i) and (ii)). The Commission notes 0.028 tonnes of CO2-e per tonne of ROM coal is the predicted average emissions intensity for all Scope 1 emissions between 2023 and 2033.

159. Alternatively, or in combination with the operation of condition B36 described above, the Applicant will always have the opportunity, over the entire life of the Project, to offset any GHG emissions over the prescribed limits in order to maintain compliance with the conditions. The Commission does not consider it reasonable or appropriate to require offsetting of all of the

Project's GHG emissions - instead, the Applicant will retain the practical flexibility of choosing whether to:

> a) continuously implement and deploy appropriate technologies for the minimisation and/or beneficial reuse of fugitive methane and other emissions, being the outcome the conditions are intended to encourage; or
>
> b) offset exceedances of the emission reduction levels prescribed under condition B36.

160. The Commission has also imposed condition B31 'Air Quality and Greenhouse Gas Operating Conditions' requiring the Applicant to take all reasonable steps to "*(a)(iii) improve energy efficiency and minimise Scope 1 and Scope 2 GHGEs generated by the development*". The Applicant will also be required to ensure that all new 'non-road' mobile diesel equipment used in undertaking the development includes reasonable and feasible emissions reduction technology as required by Condition B31(b). The Applicant must also minimise GHG emissions by using electricity generated by renewable or carbon neutral energy sources where reasonable and feasible as required by condition B36 imposed by the Commission.

161. 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."

42 The Commission then considers and made findings in relation to the "Key Issues Raised" (as mentioned at [38] above), before summarising its overall findings and determination in its Reasons (at pars (292)-(295)) (which, for convenience, are reproduced as annexure "A" to this judgment).

43 In considering "Biodiversity", the Commission notes (at pars (201)-(222)) that the Project would disturb up to 475ha of native vegetation, including approximately 161ha of woodland, and up to 314ha of derived native grassland, and that the Project "proposes to relinquish approval (under the Existing Approval) to disturb an area of 485 hectares … and as such, there is no significant net change to the overall disturbance area proposed". The

Commission then considers the Revised Biodiversity Development Assessment Report ('BDAR').

44 As considered later in this judgment under Ground 7 – Lizard Ground, the Commission (at (210)-(216)) considers the Department's assessment of the newly identified (potentially endangered) species, the Legless Lizard, and concludes in its Reasons (at par (220)) that the impacts on the Legless Lizard were "capable of being managed through appropriate conditions of consent" and that further investigations, surveys and research were needed to effectively manage and protect the species. The Commission imposes a number of conditions including conditions B63(i) and B63(j) which require MACH to demonstrate how the Project would be carried out in a manner that avoids or minimises to the greatest extent practicable any serious or irreversible damage to the Legless Lizard's survival.

45 In its Reasons (at par (217)) the Commission records that it agrees with the Department that the biodiversity impacts of the Project had been appropriately minimised and that residual biodiversity impacts could be appropriately offset. The Commission imposes conditions of consent requiring the retirement of biodiversity credits and preparation of a "Biodiversity Management Plan".

Ground 1 – Resources SEPP Ground

DAMSHEG's position

46 In relation to this ground, and Grounds 2, 3 and 4, by way of background, DAMSHEG submits that the reasoning and findings of the Commission should be closely considered in the light of the fact that the Commission received, but did not "grapple" with, the following cogent, credible and uncontradicted evidence from a range of eminent scientists, researchers, and authoritative government agencies (referencing, in particular, evidence received from Prof Sackett):

(1) That all emissions, including Scope 3 emissions, released when fossil fuels are combusted (by any downstream end user) "must be included when considering environmental and social effects, including environmental and social effects to NSW". In this regard, the Project's Scope 3 emissions amount to 0.06% of all yearly global emissions;

(2) Irrespective of where in the world the greenhouse gas has been emitted, the effect of climate change is global. Because this effect is

global, the concept of a "global carbon budget" should be utilised to estimate the speed and magnitude by which emission reductions must occur to meet a target global warming limit. In this context, the Project alone could erode the global carbon budget by more than half that consumed by the entire State of NSW from 2023 until it (presumably) reaches net zero by 2050. Additionally, the Project is one of only 650 similarly sized (in a greenhouse gas sense) global projects across energy, transport, agriculture, and industry that would "spend" the remaining global carbon budget;

(3) Australia contributes to what is called the "Production Gap" – being the disconnect between the intention to produce more fossil fuels and simultaneously seek to reduce emissions to meet the Paris Agreement. This is because Australia is a key "enabler" of the generation of greenhouse gases from fossil fuels, being the world's fifth largest producer of coal, the second leading exporter of coal (by weight), and the largest exporter of black coal. Specifically, Australia's extraction-based emissions from fossil fuel (coal and gas) production are expected to double by 2030 compared to 2005 levels. Therefore, although Australia is party to the Paris Agreement, Australia is simultaneously working against global warming being held to 1.5ºC through large volumes of Scope 3 emissions associated with its fossil fuel production which is primarily for export;

(4) Recent analysis indicates that 95% of Australia's coal reserves must stay in the ground for the world to have a 50% chance of holding global warming to a 1.5% increase. Similarly, the International Energy Agency's global energy sector roadmap for net zero emissions by 2050 lists, as a major milestone, that no new or extended coal mines be approved, beginning in 2021; and

(5) The devastating effect that climate change will have in NSW is incontrovertible, including that Australia is one of the most vulnerable of all developed countries to climate change.

47 In relation to Ground 1, DAMSHEG submits that the Commission was required to take into account matters set out in s 4.15(1)(a)(i) of the EPA Act, which, in turn, required the Commission to consider cl 2.20(1)(c) and cl 2.20(2) of the Resources SEPP.

48 DAMSHEG submits that as the words "greenhouse gas emissions" in cl 2.20(1)(c) of the Resources SEPP include Scope 3 emissions (*Kepco Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216 ('*Kepco*') at [139]-[140] and [179] (Preston CJ of LEC)), and as "downstream emissions" in cl 2.20(2) includes Scope 3 emissions, cl 2.20(1) required the Commission to consider whether conditions should be imposed to minimise Scope 3 emissions to the greatest extent practicable.

49 DAMSHEG submits that MACH can point to no part of the Reasons where consideration was given to whether conditions should be imposed on Scope 3 emissions, and that the Commission simply agreed with the Department AR, which it erroneously adopted in circumstances where no conditions in relation to Scope 3 emissions were recommended (and none imposed). DAMSHEG contends that it may therefore be concluded that Scope 3 emissions were not considered, despite there being a mandatory duty to do so.

50 DAMSHEG submits that the approach of the Commission is different to the manner in which a differently constituted commission had dealt with similar matters as considered in *Kepco* (where the proponent had applied for development consent to construct a thermal coal mine and the commission found that the development proposal failed to contain steps minimising greenhouse gas emissions, in particular, Scope 3 emissions) where the commission gave specific consideration to whether discrete conditions could have been imposed regarding Scope 3 emissions, and found that they could not.

51 DAMSHEG also points to *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110; (2021) 252 LGERA 221 (‘*Mullaley*’) (Preston J), where a community action group contended that a decision of a (differently constituted) commission to grant development consent for a new coal seam gas field project was invalid and the Court found that the commission had not erred in law as it had provided an extensive explanation for why it was not placing conditions on Scope 3 emissions (on the basis that the Scope 3 emissions were “not within the direct control of the proponent of the development”). DAMSHEG submits that in the present circumstances, there were methods available to impose specific conditions relevant to Scope 3 emissions such as, for example, imposing conditions to restrict export to countries who are not parties to the Paris Agreement. In substance, DAMSHEG’s concern is that the Commission did not even consider whether specific conditions could be imposed to minimise Scope 3 emissions.

52 DAMSHEG further submits that, contrary to the obligation in cl 2.20(2) of the Resources SEPP, the Commission did not consider any assessment of

"downstream emissions" in the context of applicable State or national policies. And, that the analysis in its Reasons (at pars (126)-(136)) of a limited number of international, national and State policies was perfunctory and did not address matters raised by cl 2.20.

53 In considering international policies, the Commission only referred to the Paris Agreement and simply notes in its Reasons (at pars (126)-(127)) that Scope 3 emissions are "counted" in the downstream consumer country.

54 The only national policies referred to by the Commission were the National Greenhouse and Energy Reporting Scheme ('NGERS') and the Emissions Reduction Plan where the Commission notes in its Reasons (at par (128)) that the NGERS and the Emissions Reduction Plan did not require the reporting of Scope 3 emissions.

55 In relation to State policies, the Commission in its Reasons (at pars (131)-(132)) simply referred to the policies identified in the Department AR but did not separately name the policies. The Department AR referred to the Net Zero Plan; the NSW Government's *Strategic Statement on Coal Exploration and Mining in NSW* (2020); the NSW Government's Upper Hunter Strategic Regional Land Use Plan; and the NSW Government's Hunter Regional Plan 2036; and also made reference to the CCPF simply noting that the government's objective was to reach net-zero emissions by 2050 and for NSW to be more resilient to climate change.

56 Moreover, despite making an express finding that Scope 1 and Scope 2 emissions were consistent with current national and NSW policy settings and commitments, the Commission remained silent as to whether the same applied to Scope 3 emissions.

57 DAMSHEG submits that the above demonstrates that the Commission failed to address the task assigned by cl 2.20(2) of the Resources SEPP because the Department did not have regard to "all" applicable State and national policies regarding greenhouse gas emissions. More particularly, there was no consideration of any assessment of Scope 3 emissions at all (on the basis that the Commission considered that Scope 3 emissions will be counted by the downstream consumer country). Further, the Commission did not consider key

parts of the CCPF (including the NSW Government committing to take “emissions savings actions”, adopting certain policy directions such as – creating investment certainty by managing the transition of the energy system; reducing risks to public and private assets arising from climate change; reducing climate change impacts on health and well-being; and managing impacts on natural resources).

58 Moreover, as the Commission states that it agrees with and adopts the Department's assessment (in the Department AR), and, in circumstances where the Department provided no recommended conditions which dealt with minimising Scope 3 emissions (such that the Department did not consider whether conditions could be imposed to minimise Scope 3 emissions), by adopting the Department’s approach, the Department’s errors became the Commission’s errors: *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* [2008] FCA 1521; (2008) 162 LGERA 154 at [95] (Buchanan J); *Peko-Wallsend* at 30-31.

MACH’s position

59 In relation to this ground and Grounds 2 to 5, all of which deal with the Commission’s treatment of greenhouse gas emissions, MACH submits that the Court, conscious that it is engaged in judicial review and not merits review, should carefully consider the factual background and the detailed material considered by, and the reasoning of, the Commission, and submits that DAMSHEG’s contentions do not arise from a fair reading of the Reasons when the real matters in issue are understood in context. In particular, MACH notes three additional factual background matters that provide context.

60 First, the EIS addressed greenhouse gas emissions in various places and sets out a “quantitative assessment of potential greenhouse gas emissions” as well as detailing mitigation measures including the implementation of an adaptive management approach. The EIS also contained an “Economic Assessment” which assessed the potential environmental costs associated with greenhouse gas emissions.

61 Second, the Department AR, having identified greenhouse gas emissions as a “key assessment issue”, and having acknowledged that global transition away

from fossil fuel was required to meet the changes presented by climate change, expressed the view that the Project was “consistent with” the objectives of the Emissions Reduction and the NSW Government's *Strategic Statement on Coal Exploration and Mining in NSW* (2020), which recognise that in the short to medium term there will be a strong global demand for thermal coal. The Department also indicated that it was aware of community concerns about greenhouse gas emissions and the costs associated with climate change and had “carefully considered additional emissions over the life of the mine including past mining…”, concluding that, on balance, the benefits of the Project outweigh the costs.

62 Third, the Commission addressed the topic of greenhouse gas emissions in various places in its Reasons. The Commission appreciated that while Scope 3 emissions were not counted towards domestic emissions under the Paris Agreement, their impact is still felt globally. The Commission identified greenhouse gas emissions and climate change as a “key issue”, in particular, in its Reasons (at pars (125)-(161)), which included consideration of Australia’s obligations under the Paris Agreement; Commonwealth policies (including the NGERS, Emissions Reduction Plan, and the Commonwealth’s commitment to a 43% reduction in greenhouse gas emissions by 2030); as well as State policies (including NSW Government targets, the CCPF, and the Net Zero Plan). The Commission also addressed the Project’s estimated Scope 1 and 2 emissions as well as Scope 3 emissions. And, identified the various assessments set out in the Department AR, the greenhouse gas assessment accompanying the EIS, and the updated greenhouse gas calculations provided by MACH.

63 In the light of the above material before the Commission, MACH submits, first, that the Court would not accept DAMSHEG's position that the Commission simply “adopted” the reasoning and view of the Department in relation to greenhouse gas emissions in circumstances where the Department AR was only one of the documents considered, and given weight, by the Commission. Specifically, there is evidence in its Reasons (at pars (125)-(161)), that the Commission’s consideration of greenhouse gas emissions and the Resources SEPP extended well beyond the material contained in the Department AR.

64 Secondly, to the extent DAMSHEG submits that the Department conducted itself “in error”, the Court would accept that the decision under challenge is the Commission's decision and not any anterior conduct of the Department. Further, the fact that the Department did not consider whether or not to recommend a specific condition in relation to Scope 3 emissions does not establish that the Department did not “consider” whether or not to recommend such a condition. The Department's wording (in the Department AR (at pars (190)-(218) and (332)-(338)), read fairly, indicates that the Department was engaging with cl 2.20 of the Resources SEPP throughout its assessment (although using the reference to the predecessor to cl 2.20, being cl 14 of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (‘Mining SEPP’), which uses the same terms).

65 Thirdly, the Commission's duty was a duty to consider whether or not to attach conditions of the identified kind and the Commission, itself, was not under a duty to minimise greenhouse gas emissions (including Scope 3 emissions) to the greatest extent practicable. The text of cl 2.20(1) of the Resources SEPP recognises a discretion in the consent authority *not* to attach conditions directed to minimising greenhouse gas emissions. As such, the Court would not accept the fact that a condition in relation to Scope 3 emissions was not attached, as establishing a failure to *consider* whether or not to attach a condition of the kind.

66 Fourthly, the Commission did not breach cl 2.20(2) of the Resources SEPP in circumstances where its duty was no more than to consider an assessment of greenhouse gas emissions and it did so in its Reasons (at pars (16), (139)-(142), (143)-(149) and (156) in respect of Scope 1 and 2 emissions) and (at pars (150)-(151) in respect of Scope 3 emissions). Moreover, the Commission identified the estimated quantum of Scope 3 emissions and acknowledged that they would contribute to climate change (which had the potential to impact future generations) and, the Reasons, read fairly, expressed the view that those emissions were appropriately regulated and accounted for through broader national policies and agreements (at par (150)). This view was well open to the Commission.

67 Fifthly, the Court would not infer that the Commission failed to consider parts of the CCPF in breach of cl 2.20(2) as suggested by DAMSHEG, where the Commission did take those matters into account and, in any event, was not under a duty to set out, word for word, each sentence of evidence it says it has considered. The Commission expressly indicated that it had considered certain international, national and State policies and there is no reason for the Court to conclude otherwise.

Consideration

68 In relation to a number of the grounds raised by DAMSHEG, and putting to one side MACH's submission that the Commission did not "grapple" with a significant amount of the expert climate-related material before it, I accept that there were essentially three uncontroversial matters before the Commission which provide context for the conduct and reasoning of 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 many countries through the Paris Agreement (and Australia's participation and adoption of consequential policies) seek to limit the extent of climate change and, while this aim is centred in the Paris Agreement, regulatory settings throughout the world call for a fundamental transition away from emissions activities to achieve net zero emissions. Both the Paris Agreement and related regulations have a goal of keeping temperature increases well below 2ºC above the pre-industrial level. Third, it is clear that there will be an ongoing demand for coal, at least in the short to medium term, which is not inconsistent with the Paris Agreement as it requires a managed transition away from a reliance on fossil fuels.

69 I accept MACH's submission that these uncontroversial matters provide context for the Commission's reasoning in circumstances where, at least in relation to the above three matters, there was no substantial factual controversy for the Commission to resolve. I also take into account DAMSHEG's submission that there was some disagreement between the various expert reports, and I have read DAMSHEG's compilation of references to "Climate Impact Facts in Dispute" (which became MFI 7). It is in these circumstances that MACH suggests, and I accept, that the Commission's

consideration and reasoning in relation to a number of matters of concern raised by DAMSHEG (in Grounds 1 to 5) 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.

70 In accordance with *Singh* at [47], primary consideration should be given to the reasons of a decision-maker for the exercise of the power to show why the power was exercised in the way it was (and that there is an intelligible justification for the decision). As will be seen, I consider the reasoning of the Commission for why it decided as it did, is shown – in the sense that the Reasons provide an intelligible justification for its decision.

71 DAMSHEG contends that the Commission first, did not consider whether conditions should be issued to minimise Scope 3 emissions to the greatest extent possible; and second, did not consider an assessment of Scope 3 emissions having regard to all applicable State or national policies concerning greenhouse gas emissions. For the following reasons, and not without some concern, I do not accept DAMSHEG's position in relation to either limb of this ground. I will deal with each contention.

72 While I accept MACH's submission that the anterior conduct of the Department is not necessarily determinative, primarily because the Department is not under any obligation pursuant to cl 2.20 of the Resources SEPP, I find that it cannot be inferred that the Department AR did not give consideration to conditions relating to the reduction of greenhouse gas emissions (including Scope 3).

73 Leaving aside the incorrect reference to s 14(1) of the Mining SEPP (as opposed to cl 2.20(1) of the Resources SEPP) in the Department AR, as noted above, DAMSHEG maintains that the Department itself did not deal with the equivalent cl 2.20(1) in any event because its recommended conditions did not address minimising Scope 3 emissions and, as such, it "did not consider whether conditions could minimise Scope 3 emissions".

74 The Department, while describing the three categories of greenhouse gas emissions and providing the estimates of each (noting that 98% of the total greenhouse gas emissions were Scope 3 emissions, and dealing in detail with

Scope 1 and Scope 2 emissions) and noting its earlier concern regarding the adequacy of the detail in the EIS in relation to greenhouse gas emissions, considered the further "detailed response" provided by MACH. Thereafter, the Department acknowledged the "global transition away from fossil fuels … to meet commitments under the Paris Agreement…", and also dealt with the continuation of the short to medium term demand for coal and noted that the Project was consistent with the objectives of "*Australia's Long-Term Emissions Reduction Plan* and the NSW Government's *Strategic Statement on Coal Exploration and Mining in NSW* (2020)" in the Department AR (at pars (207) and (335)). The Department AR (at pars (331)-(338)) specifically provided:

> "331. 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.
>
> 332. 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.
>
> 333. Scope 1 and Scope 2 emissions associated with the project would have a relatively low emissions intensity compared to other coal mining projects, which reflects the relatively low strip ratios at the mine, and the existing brownfields nature of the project, with significant existing mine infrastructure and established mining areas.
>
> 334. The project's emissions have been accounted for in the NSW GHG emissions projections in the Department's Net Zero Plan.
>
> 335. The Department also accepts that the project is consistent with the objectives of Australia's *Long-Term Emissions Reduction Plan* and the NSW Government's *Strategic Statement on Coal Exploration and Mining in NSW (2020)*, which recognise that in the short to medium term there will still be a strong global demand for thermal coal to satisfy society's basic power generation needs.
>
> 336. The Department also recognises that the project would provide significant social and economic benefits for the Upper Hunter and wider region, including:
>
> > - continued direct employment at the mine for an average of 600 people, and up to 830 people;
> > - approximately 450 direct/indirect jobs in the Upper Hunter, and 650 in the wider Hunter region;
> > - $1.4 billion (NPV) net contribution to gross state product;
> > - $20 million (indexed) in contributions to Muswellbrook Shire Council, and $6 million (indexed) to Upper Hunter Shire Council, towards community enhancement projects.
>
> 337. 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 compensated.

338. These include conditions requiring MACH to:

- acquire the properties predicted to be significantly affected by noise and or air quality, upon request from the landowner;
- provide additional mitigation measures on residences predicted to be significantly or moderately affected, upon request of the landowner;
- obtain all necessary water licences required for the project;
- offset the project's residual biodiversity impacts;
- minimise visual and lighting impacts, and prepare comprehensive rehabilitation strategies and plans;
- limit GHG emissions, and implement measures to continually reduce emissions;
- enter into planning agreements with Muswellbrook Shire Council and Upper Hunter Shire Councils to provide substantial contributions towards community projects; and
- prepare a comprehensive suite of management plans, and undertake annual reviews and periodic independent audits."

75 Further, while there is a question as to what specific inference can be drawn from the absence of a specific reference in the Department AR to Scope 3 emissions, I do not draw the inference suggested by DAMSHEG. The Department was aware that 98% of the Project's total greenhouse gas emissions were generated by downstream burning of coal, nevertheless dealt with the need to minimise such emissions, and actually proposed certain conditions (albeit only for Scope 1 and Scope 2 emissions).

76 Although there were no conditions proposed by the Department in relation to Scope 3 emissions, there was express reference in the Department AR (at par (335)) to the Emissions Reduction Plan and the NSW Government's *Strategic Statement on Coal Exploration and Mining in NSW* (2020) (which as noted earlier, related to the Department's (and later the Commission's) recognition that there would remain a strong global demand for coal to satisfy "society's basic power generation needs"). Moreover, simply because the Department did not recommend conditions specifically directed to Scope 3 emissions, does not, on its own, establish that it did not consider (in the sense I have noted above) whether or not to recommend such a condition. This is clear from the wording in the Department AR (at pars (190)-(218) and (332)-(338)).

77 Further, although the Department AR was only part (albeit a significant part) of the extensive material before it, the Commission specifically acknowledged that Scope 3 emissions are not in the (otherwise required) emission reporting to "avoid double counting". As such, I accept MACH's submission that the Commission (in its Reasons at pars (125)-(161)) under the heading "Greenhouse Gas Emissions" provided reasoning beyond the material and wording in the Department AR.

78 My findings above hinge on my view that cl 2.20(1) of the Resources SEPP contains an obligation on the Commission to consider whether or not to attach conditions and the text of cl 2.20(1) recognise a discretion in the consent authority not to attach conditions. Moreover, to the extent necessary, I find that the proper inference from the Commission's reasoning as a whole, and with particular emphasis in its Reasons (at pars (150)-(151) and (154)-(161)), is that the Commission had, for the reasons it gave, elected to exercise its discretion not to attach conditions specifically directed to Scope 3 emissions.

79 Put another way, I remain aware that cl 2.20 of the Resources SEPP requires the Commission to consider whether or not to impose conditions in relation to Scope 3 emissions and that the Commission made a permissible evaluative decision *not* to impose conditions. It was not under a specific duty to impose conditions.

80 In summary, I find that the Commission was aware of, and accepted that, the combustion of coal is a major contributor to anthropogenic climate change, and that the Project's Scope 3 emissions would contribute to this change. The Commission noted and accepted that those emissions are "accounted for" through broader national policies and international agreements, and specifically recorded in its Reasons (at par (151)) that the emissions associated with burning coal to produce energy are accounted for at the "international powerplants where that combustion takes place". As such, I find that the Commission considered and accepted that Scope 3 emissions are not included in the Project's emission reporting to "avoid double counting". Further, the Commission noted that it had "considered all emissions associated with the

Project (including Scope 3 emissions) in its assessment and determination” in its Reasons (at par (151)).

81 For the reasons above, I do not find that the Commission failed to consider whether to impose conditions to ensure Scope 3 emissions were minimised to the greatest extent practicable. Although, as DAMSHEG submits, it is difficult to point to where in the Reasons specific consideration was given to whether conditions could be imposed, I consider that, read fairly, and in the context of the uncontroversial matters (as I have noted at [68] above), such consideration was given in accordance with the Commission’s obligation. It is clear that the Commission was aware that all greenhouse gas emissions (including Scope 3 emissions) would contribute to anthropogenic climate change which has the potential to impact upon future generations and that, on a number of occasions, the Commission expressly stated that it was considering Scope 3 emissions in its overall assessment. I do not accept DAMSHEG’s submission that this was merely lip service where the Commission’s stated position was that it considered that Scope 3 emissions are accounted for elsewhere; followed by the Commission stating that it nevertheless took Scope 3 emissions into account in assessing the Project in its Reasons (at par (150)) and, as such, it is clear that the Commission was in no doubt that anthropogenic climate change was real, and that a significant threat follows. For the above reasons, I consider that DAMSHEG has not made out this part of Ground 1.

82 In relation to DAMSHEG’s discrete challenge based upon cl 2.20(2) of the Resources SEPP, similar to my reasoning above, it is clear that the Commission was aware (and acknowledged) that Scope 3 emissions would contribute to climate change and have the potential to impact on future generations. However, to the extent that the Commission “must consider an assessment of the greenhouse gas emissions (including downstream emissions) … and … must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions”, I find that, taking into account the material before the Commission noted in its Reasons (at par (16)), the commentary and findings under the heading “Project GHG Emissions” (at pars (139)-(142)), the consideration in its

Reasons (at pars (143)-(149) and (156)) albeit in relation to Scope 1 and 2 emissions, and (at pars (150)-(151)) in respect of Scope 3 emissions, it could not be inferred that the Commission did not "consider an assessment" of the greenhouse gas emissions (including downstream emissions).

83 In these circumstances, while the gist of DAMSHEG's contention is that the Commission expressed the view in its Reasons (at pars (127)-(128) and (150)) that those Scope 3 emissions were "appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement)" and as a result, effectively "dismissed" Scope 3 emissions from its consideration, I accept MACH's submission and find that nothing in cl 2.20(2) of the Resources SEPP obliged the Commission to treat the assessment of the emissions (even Scope 3 emissions) in a particular way. The ultimate question is whether the Commission's apparent conclusion that Scope 3 emissions were properly regulated through broader national policies and agreements (as it did at par (150) noted above) is properly challengeable. For the above reasons, I consider it is not.

84 Further, it is clear that the Commission considered (in the sense I have noted above) Australia's obligations under the Paris Agreement in its Reasons (at pars (126)-(127)), where it states:

> "126. Australia is a signatory to the UNFCCC Paris Agreement, which requires signatories to identify actions to cut emissions, and under this agreement Australia has committed to reduce national GHG emissions by 2030. These actions are referred to as a Nationally Determined Contribution **(NDC)**. The UNFCCC and related articles specify that all emissions associated with an activity within Australia's border count towards Australia's total emissions.
>
> 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."

85 The Commission also considered various national policies including the NGERS (albeit with the Commission specifically noting that this scheme does not require reporting of Scope 3 emissions); the Emissions Reduction Plan, developed by the previous Commonwealth Government (which the Commission noted was a "whole-of-economy plan to achieve net zero

[greenhouse gas] emissions by 2050"); the current Commonwealth government's commitment to a 43% reduction in greenhouse gas emissions by 2030 (in its Reasons at pars (128)-(130)); and various State policies including NSW targets; the CCPF; the Net Zero Plan, the NSW Energy Package MOU and the Coal Innovation Fund (at pars (131)-(135)); and noted that the Department AR identified that there was a "range of NSW climate change policy and guidance".

86 I do not accept DAMSHEG's further submission that the Court should infer that the Commission failed to consider "all applicable policies" because it did not consider "key parts" of the CCPF (as summarised at [57] above). The Commission was under no duty to detail any specific aspect of all policies considered. There is no reason to doubt the Commission's statement that it had considered the CCPF (at pars (132) and (154) of the Reasons).

87 As I have found above, it is also clear that the Commission considered various assessments of greenhouse gas emissions in the Department AR as well as the greenhouse gas assessment which accompanied the EIS and the further updated greenhouse gas calculations provided by MACH (at pars (139)-142)). In these circumstances, I do not accept that the Commission acted in a manner contrary to cl 2.20(2) of the Resources SEPP as I find that it did make "an assessment" of the greenhouse gas emissions related to the Project and did so having regard to applicable State or national policies, programs or guidelines.

88 Ground 1 is not made out.

Ground 2 – Likely Impacts Ground

DAMSHEG's position

89 DAMSHEG submits that the Commission misconstrued and misapplied s 4.15(1)(b) of the EPA Act (which requires consideration of the likely impacts of a proposed development including environmental impacts on both the natural and built environments, as well as social and economic impacts in the locality) in its consideration of the likely impacts of Scope 3 emissions.

90 DAMSHEG submits that it was incumbent on the Commission to take Scope 3 emissions into account when considering the likely impacts of the Project given the Commission's acknowledgement that 98% of total greenhouse gas

emissions from the Project are associated with downstream Scope 3 emissions. And, despite the uncontested evidence before the Commission (noted at [46] above) that the impacts associated with combustion emissions cannot be isolated to a particular geographic location such that all of the Project's greenhouse gas emissions (irrespective of whether Scope 1, Scope 2 or Scope 3) will increase global temperatures leading to a wide range of environmental damage, the Commission found that they were "appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement)".

91 DAMSHEG submits that the Commission's reliance on other countries assessing Scope 3 emissions in line with their commitments under the Paris Agreement (which can be taken to include action to mitigate, offset or otherwise "net out" Scope 3 emissions, in order to meet the receiving countries' Paris Agreement commitments) and the Commission's concern in relation to "double counting", rested on unspecified and uncertain actions by third-party countries as to the action that would be required and the timeframe for that action to be taken.

92 Thus, by asserting that Scope 3 emissions would be counted by the country which burnt the coal, the Commission disregarded the likely impacts of Scope 3 emissions which it was required to consider by reference to s 4.15(1)(b) of the EPA Act in circumstances where "impact" in s 4.15(1)(b) also encompasses indirect impacts of an action. The manner in which Scope 3 emissions are accounted for pursuant to international global warming agreements is not relevant to the real-world question of their likely impacts.

93 Further, the comment by the Commission in its Reasons (at par (151)) that Scope 3 emissions had been "considered", was merely lip service, and does not indicate consideration of a mandatory consideration through an active intellectual process and/or with independent and reasoned consideration by reference to the material before the Commission. It is clear from its Reasons (at par (151)) that the Commission avoided considering the likely impacts of Scope 3 emissions. Moreover, the Commission, by stating (at par (150)) that Scope 3 emissions are a "major contributor to anthropogenic climate change,

which has the potential to impact future generations" does not amount to the Commission adequately discharging its obligation of considering the likely impacts of the Project.

94 DAMSHEG submits that the Commission engaged in the vice identified by Moffitt P in *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 339 – that it is not sufficient for a decision-maker to advert to a relevant consideration and then discard it.

95 DAMSHEG alternatively submits that the Commission "disabled itself" from considering the likely impacts of Scope 3 emissions because of its "irrational premise" that their effect was in some way neutralised by being "counted" in a country where the coal was used. In this way, the Commission failed to consider the uncontested evidence about the effect of Scope 3 emissions on climate change, and thereby failed to take into account the likely effect and/or engaged in an irrational or illogical form of reasoning by accepting that "accounting" by downstream users obviated the need to consider the impacts of those emissions.

MACH's position

96 MACH repeats its earlier submissions and submits that the Commission considered Scope 3 emissions on a number of occasions in its Reasons (at pars (70), (125), (127), (139)-(142), (150)-(151), (161) and (293)) and appreciated that, while Scope 3 emissions were not counted at the place of extraction, the impact of climate change is still felt globally and has the potential to impact future generations. However, the Commission concluded that, although Scope 3 emissions would contribute to climate change, they are appropriately regulated and accounted for through broader State, national or international policies. Furthermore, the Commission specifically noted that "with the adoption of the Paris Agreement, almost all countries have committed to reduce global GHG emissions" (at par (153)).

97 MACH submits that the Commission's reasoning does not bespeak a failure to consider Scope 3 emissions and their impacts. Rather, MACH submits that the Reasons, read fairly, show that the Commission appropriately assessed and

engaged with the significance of the likely impacts of Scope 3 emissions through the prism of international and national policies.

98 Further, as the Commission was entitled to conclude that Scope 3 emissions were appropriately regulated by broader policies, there was nothing “irrational” in its reasoning as the Commission did not consider that the impact of Scope 3 emissions was “neutralised” or somehow disappeared because it was accounted for elsewhere.

99 Contrary to DAMSHEG’s contention, the Commission, in parts of its Reasons (at pars (150)-(151)) otherwise impugned by DAMSHEG, expressed not dissimilar views to those of a (differently constituted) commission which were considered by Duggan J in *Bushfire Survivors*, where her Honour held (at [29], [56] and [112]) that similar reasoning in relation to Scope 3 emissions did not indicate that the Commission had asked the wrong question or had failed to consider the impact of Scope 3 emissions.

Consideration

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 DAMSHEG’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.

102 In relation to the Commission's consideration of the material before it (comprising representations and submissions) for this ground (and Grounds 3 and 5), and in addition to my reference to applicable legal principles at [23]-[27] above, I take into account that in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582; [2022] HCA 17, the plurality stated:

> "[24] …the decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to the representations is a matter for the decision-maker… (Citations omitted.)
>
> [25] It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them." (Citations omitted.)

103 Payne J in *Ceerose* at [62], dealt with the difficulties of using other language to articulate what is required by the verb "consider" and found that the failure to identify a particular claim or response in proffered reasons does not demonstrate that an adjudicator (as a decision-maker) failed to "consider" it for a number of reasons – first, the reasons are not always a comprehensive statement of all aspects of a decision-maker's thinking; second, the scope of the reasons reflect the practical circumstances under which a decision-maker is operating; third, it is not unusual for material supplied to a decision-maker to run into thousands of pages; and fourth, there is a question as to what specific inference is to be drawn from the absence of a reference to a particular

submission or contention. There may be a range of possible explanations – only one of which, is that the material was not considered.

104 Contrary to DAMSHEG's position, I repeat my findings (in relation to Ground 1) at [80] above and I find that it is clear that the Commission understood the centrality of the issues in relation to air quality and greenhouse gas emissions (including Scope 3 emissions) in the submissions and did not disregard them by giving regard to the fact that Scope 3 emissions are accounted for at end user. In relation to "Key Issues Raised" in its Reasons (at pars (69)-(75) and (110)-(161)), it is clear that the Commission was alive to the submissions in relation to climate change and greenhouse gas emissions. The Commission was aware of the cumulative impact of greenhouse gas emissions and that although Scope 3 emissions are not counted at the place of extraction and therefore not counted as part of Australia's emissions under the Paris Agreement but accepted that the impact of any Scope 3 emissions is still felt globally. This is not a failure to consider the likely impact of Scope 3 emissions as MACH pleads.

105 In *Mullaley*, the Court found that the evaluation of greenhouse gas emissions involves three steps, first, identifying the extent of the greenhouse gas emissions; second, assessing the impacts of those emissions; and third, evaluating the acceptability of those impacts. In that case, the Court found that a (differently constituted) commission had assessed the environmental impacts of total greenhouse gas emissions (being Scope 1, 2 and 3 emissions) and its reasons contained findings in relation to "their contribution to global climate change": *Mullaley* at [57]-[58]. The wording of the commission's reasoning, accepted by the Court in *Mullaley*, is not dissimilar to par (150) of the Reasons.

106 Further, the Commission specifically records in its Reasons (at par (151)) that it has considered all emissions, including Scope 3 emissions, in its assessment and determination. Again, the context of this reasoning is the Commission's acceptance that the mining of coal (and its combustion) is a major contributor to anthropogenic climate change, which has the potential to impact future generations, and that Scope 3 emissions would be a contributory factor. It is clear that the Commission found that there would be negative impacts

associated with all emissions (including Scope 3 emissions) and it has considered them in a manner found to be acceptable in *Mullaley*.

107 I accept MACH's submission that there is no indication in the Reasons (or any other material) to the effect that the Commission did not understand the effect of Scope 3 emissions or their impacts and there is no comment that they were disregarded, or that they were factually wrong, or for any reason irrelevant (and this is particularly clear in its Reasons (from pars (69) and onwards). Moreover, the fact that "Greenhouse gas emissions and climate change" were the first matters considered under "Key Issues Raised" speaks to the significance the Commission attached to these impacts.

108 It is also clear that the references to greenhouse gas emissions in the Reasons refer specifically to Scope 1, Scope 2 and Scope 3 emissions and that there is nothing that would indicate that the Commission regarded Scope 3 emissions as in some way irrelevant, or to be put to one side, or indeed outside the scope of the Commission's consideration of impacts.

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 DAMSHEG 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".

111 In relation to this ground, and the overlapping arguments in Ground 3, I note again that it is now trite that labels such as "active intellectual process" and "proper, genuine and realistic consideration" must be understood in their proper context and noting the words of Mason J in *Peko-Wallsend* at 40, "[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind … the court [does not] substitute its own decision for that of the administrator." Conscious that a decision is not legally unreasonable just because reasonable minds may reach a different conclusion about the correct or preferable decision (*Li* at [28]), and that it is rare to find unreasonableness where expressed reasons demonstrate a justification for a determination (*SZVFW* at [84]), I find that the justification given by the Commission for not imposing conditions in relation to Scope 3 emissions was that those emissions are attributed to the country within which they are emitted (under the Paris Agreement pursuant to which almost all countries have committed to reduce global greenhouse gas emissions). This, considered with the conditions otherwise imposed, provides a rational basis for not imposing such conditions. It was an evaluative decision open to the Commission and had an evidentiary foundation.

112 Ground 2 is not made out.

Ground 3 – Public Interest Ground

DAMSHEG's position

113 DAMSHEG submits that the Commission failed to consider (or engaged in irrational reasoning in considering) the likely impacts of Scope 3 emissions as a negative effect in its assessment of the public interest as required by s 4.15(1)(e) of the EPA Act and thus failed to take account of a mandatory consideration.

114 DAMSHEG points to the table headed "Table 1 – Mandatory Considerations" ('Table 1') in the Reasons (at par (35)) which adjacent to the heading "The

Public Interest (Including Ecological Sustainable Development (ESD))", noted as follows:

> "The Commission has considered whether the grant of consent to the Application is in the public interest. In doing so, the Commission has weighed the predicted benefits of the Application against its predicted negative effects.
>
> …"

115 DAMSHEG, relying on *Barrington - Gloucester - Stroud Preservation Alliance Inc v Minister for Planning and Infrastructure* [2012] NSWLEC 197; (2012) 194 LGERA 113 at [160] (Pepper J), submits that the consideration of the public interest must include consideration of the principles of ecologically sustainable development ('ESD') which necessarily incorporates considerations of intergenerational equity, the precautionary principle, and therefore, climate change. Such concepts are also contemplated under the objects of the EPA Act as set out under s 1.3(b).

116 DAMSHEG submits that it is clear that Scope 3 emissions would be a predicted negative impact of the Project, with the Commission acknowledging that 98% of the total greenhouse gas emissions result from downstream emissions and that there was uncontested evidence before the Commission that the likely impacts associated with Scope 3 emissions would lead to significant economic, social and environmental damage. Despite this, the Commission did not treat Scope 3 emissions as a negative impact for the purpose of the public interest mandatory consideration and this is clear because the Commission noted (in Table 1) that:

> "…
>
> In the absence of conditions being imposed on any grant of consent to the Application, the Commission considers that the predicted negative impacts of the Application would warrant refusal of the Application. …" (DAMSHEG's emphasis added.)

117 The Commission then proceeded on the basis that conditions of approval would mitigate the negative impacts of the Project however, none of the conditions imposed were aimed at minimising the likely impacts of Scope 3 emissions. DAMSHEG contends that this silence on Scope 3 emissions in the conditions imposed shows the Commission did not factor into its analysis that Scope 3 emissions were a negative impact of the Project. As such, the Commission disregarded the likely impacts of Scope 3 emissions when

considering the public interest as required pursuant to s 4.15(1)(e) of the EPA Act and related relevant considerations under s 1.3(b). DAMSHEG submits that this is tantamount to not assessing Scope 3 emissions at all, which is contrary to the principles of ESD and sufficient to give rise to invalidity of the decision.

118 Alternatively, DAMSHEG submits that by not including consideration of Scope 3 emissions in its analysis of the public interest because the Commission determined that the country within which they are emitted would account for these emissions, was reasoning that was illogical and irrational in the context of the principles of ESD and in particular, intergenerational equity, since burning coal anywhere in the world would increase emissions and the effects of climate change everywhere, including in NSW.

MACH's position

119 While MACH expresses some doubt that the Commission was obliged to "consider" the likely impacts of Scope 3 emissions and ESD as part of the requirement to consider the public interest, MACH rejects the submission that the Commission did not factor into its analysis that Scope 3 emissions were a negative impact of the Project nor that the Commission disregarded the likely impacts of Scope 3 emissions in considering the public interest. In relation to Ground 3, MACH makes a number of points.

120 First, the Commission did take account of Scope 3 emissions from the Project as a likely negative impact – and expressly found in its Reasons (at par (150)), 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 understood that the Project's emissions were a "key issue" in deciding whether to grant development consent. The fact that the Project was ultimately approved does not establish that the said impact was disregarded in circumstances where planning approval decisions in respect of coal mines are inevitably polycentric.

121 Second, although the Commission indicated in its Reasons that it considered that Scope 3 emissions from the Project were being accounted for in the country of consumption (under the Paris Agreement), this should not lead to the conclusion that this involved the Commission putting the fact of Scope 3

emissions entirely out of its mind. Instead, MACH contends that the Commission's engagement with Scope 3 emissions by reference to the Paris Agreement plainly involves the Commission having to grapple with the issue. It is not illogical or irrational to treat Scope 3 emissions in that way particularly where the Commission received submissions directed expressly to the topic of whether Scope 3 emissions would jeopardise the international efforts to meet the Paris Agreement targets.

122 Further, the Commission expressly addressed the public interest at various points in its Reasons (at pars (35) and (293)) and considered ESD when assessing the "key issues", and that the Commission was conscious that Scope 3 emissions (and their contribution to climate change) were considered as part of the "predicted negative impacts" which the Commission took into account when assessing the public interest.

123 Third, MACH submits that the reasoning of the Commission was not illogical or irrational in any way. Apart from numerous references to the fact that the Commission understood that the impact of greenhouse gas emissions would be felt globally, it is unrealistic to suggest that the three experts who comprised the Commission were unaware that greenhouse gas emissions from coal contributed to climate change irrespective of where the coal was consumed.

124 Further, MACH submits that DAMSHEG's reference to the Commission's wording (noted above at [116] above) is overemphasised and it is incorrect to say that the Commission was suggesting that the conditions imposed would "wholly mitigate" all the negative impacts of the Project. Further, it is also wrong to suggest that simply because there were no conditions specifically addressing Scope 3 emissions it must follow that the Commission did not take those emissions into account.

Consideration

125 Ground 3 involves a number of overlapping contentions – that the Commission did not consider that Scope 3 emissions were a negative impact on the Project, that the Commission disregarded the likely impacts of Scope 3 emissions when considering the public interest, and thereby disregarded the principle of ESD; and, apart from those matters, that the reasoning in relation to Scope 3

emissions being accounted for in countries where the coal was consumed was illogical and irrational.

126 In considering this ground, I remain conscious of both the principles in relation to the obligation to consider and caution required in relation to the use of labels (as noted at [24]-[27] and [102]-[103] above) to describe the Commission's reasoning. It is clear that an intellectual engagement is required to be undertaken by the Commission (and not simply the ticking of boxes) and that the substance of a mandatory matter to be addressed will affect the process for consideration which may also include matters in relation to policy. I am also conscious, as noted at [32] above, of the decisional freedom as to the weight to be given to particular matters.

127 In relation to the duty to consider the "public interest" (here, in relation to an alleged failure to "consider" the likely impacts of Scope 3 emissions), the expression "public interest", imports a discretionary value judgment to be made by reference to undefined factual matters and is unconfined, other than by the scope, purpose and subject matter of the Act: *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379; [2012] HCA 36 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). In the context of the EPA Act, it has been said that the "requirement that regard be had to the public interest operates at a high level of generality": *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* (2014) 86 NSWLR 527; [2014] NSWCA 105 at [299] (Bathurst CJ, Beazley P and Tobias AJA).

128 The Commission, in Table 1 (at par (35)), adjacent to the heading "The Public Interest (Including Ecologically Sustainable Development (ESD))" (and including the extract noted in DAMSHEG's submissions at [116] above), the Reasons provide:

> "…
>
> Although not determinative in and of itself, the Commission – which has no policy formulation role – accepts that NSW Government policy (including the 2020 *Strategic Statement on Coal Exploration and Mining in NSW*) expressly supports responsible coal production – including the '*government's efforts to keep NSW open for business for coal production*'.
>
> In the absence of conditions being imposed on any grant of consent to the Application, the Commission considers that the predicted negative impacts of the Application would warrant refusal of the Application.

Nonetheless, the present Application represents a responsible application for continued coal production and an orderly extension of the Mount Pleasant Mine. The grant of consent to the Application facilitates and preserves economic and other benefits to the State and the region.

The Commission's consideration of the public interest has also been informed by consideration of the principles of ESD.

The EP&A Act adopts the definition of ESD found in the *Protection of the Environment Administration Act 1991*, as follows:

> 'ecological sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:
>
> > the precautionary principle;
> >
> > inter-generational equity;
> >
> > conservation of biological diversity and ecological integrity; and
> >
> > improved valuation, pricing and incentive mechanisms.'
>
> …"

129 Table 1 then notes that the Commission has considered the principles of ESD and provides an analysis under the headings of "The precautionary principle"; "inter-generational equity"; "conservation of biological diversity and ecological integrity"; and "improved valuation, pricing and incentive mechanisms", and provides:

> "The Commission has given consideration to the principles of ESD in its assessment of each of the key issues, as set out in section 5 below. The Commission finds that, on balance, the Application is not inconsistent with ESD principles, and that the Project would achieve an appropriate balance between relevant environmental, economic and social considerations. The likely benefits of the Project warrant the conclusion that an appropriately conditioned approval is in the public interest."

130 I find that the Commission did not fail to consider the likely impacts of Scope 3 emissions in its assessment of the public interest. While it is clear that Scope 3 emissions were a predicted negative effect (as articulated by the Commission), it is clear that the Commission understood its obligation and did in fact weigh the predicted benefits of the proposed development against its negative impacts. In its consideration of the public interest, as is clear from the material noted above, the Commission specifically noted its consideration of the principles of ESD. Although DAMSHEG contends that this consideration was perfunctory, the Commission acknowledged that the public interest (including

ESD) must be considered and was conscious that it “has no policy formulation role” (in Table 1 (at par (35)) of the Reasons).

131 As noted above, the Commission had evidence that the impacts associated with combustion emissions cannot be isolated to particular geographical locations and that the Project’s greenhouse gas emissions will increase global temperatures which leads to a range of impacts. Although DAMSHEG argues that the Commission simply did not “take into account Scope 3 emissions”, I do not accept this to be the case. While DAMSHEG accepts that the Commission knew that Scope 3 emissions would contribute to anthropogenic climate change, it takes issue with the Commission finding that the concern was “appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement)” in its Reasons (at par (150)), and that Scope 3 emissions were not included to “avoid double counting” (at par (151)).

132 I do not accept DAMSHEG’s submission that the Commission's consideration, in the express terms noted (particularly the way in which Scope 3 emissions are accounted for under the Paris Agreement) equates to disregarding the likely impacts of Scope 3 emissions. While a consent authority cannot rationally approve a development that is likely to have some identified environmental impact on the basis of a theoretical possibility that environmental impact will be mitigated or offset by some unspecified and uncertain action in the future (*Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7; (2019) 234 LGERA 257 at [530] (Preston J)), here, the Commission has accepted the effects of greenhouse gas emissions, has imposed conditions relating to Scope 1 and 2 emissions and has taken account of greenhouse gas emission concerns when approving the proposed development.

133 Moreover, I do not consider that because the Commission did not specifically articulate the likely impacts of Scope 3 emissions, it can be inferred that it failed to take it into account when considering the public interest. In the commentary in Table 1 in the Reasons (at par (35)), adjacent to the heading “The Public Interest (Including Ecologically Sustainable Development (ESD))” – the Commission states it has “weighed the predicted benefits of the Application

against its predicted negative impacts". I accept, as MACH submits, that the reference to "predicted negative impacts" in Table 1 reflects the analysis in Part 5 ("Key Issues") and the Reasons (at par (141)). It is also clear that the Commission considered estimated greenhouse gas emissions from the Project in relation to each of Scope 1, Scope 2 and Scope 3 emissions and, as noted frequently, accepted that Scope 3 emissions account for 98% of total greenhouse gas emissions, similar to my findings in relation to Ground 2 (at [100]-[111] above).

134 I find that the Commission did take into account Scope 3 emissions as a likely negative impact in circumstances where it was clear that the Commission accepted that the mining of coal and its combustion is a major contributor to anthropogenic climate change which has the potential to impact future generations. Further, I find that planning decisions in respect to coal mines are polycentric and evaluative, and the Commission considered the various positive and predicted negative impacts of the Project. Further, I consider that the public interest was taken into account and was referred to in appropriate terms on a number of occasions, and when the Commission reached an overall evaluative conclusion as to whether the Project was in the public interest, it remained conscious that Scope 3 emissions contributed to climate change.

135 Ultimately, I accept the submission of MACH that the part of the wording quoted in Table 1 noted by DAMSHEG at [116] above does not suggest that the Commission considered that the attachment of conditions would wholly mitigate *all* the predicted negative impacts of the Project. I find that the Commission was concluding that without certain conditions, the balance would have been tipped against the granting of development consent. Moreover, it is clear that the Commission was conscious that the Project would have negative impacts and that it took those predicted negative impacts into account in its overall polycentric and evaluative conclusion.

136 In relation to this ground (which invokes public interest) and Grounds 2 and 4, I repeat my findings at [111] above, and I find that, given the Commission's reference to (and understanding of) the Paris Agreement and the obligations of

the signatory countries, it was not illogical or irrational to treat Scope 3 emissions as being “accounted for” in the manner the Commission so found.

137 Ground 3 is not made out.

Ground 4 – Conditions of Approval Ground

DAMSHEG’s position

138 Similar to its position in relation to Ground 3, DAMSHEG submits that in assessing the public interest (as required by s 4.15(1)(e) of the EPA Act), the Commission engaged in irrational and illogical reasoning because of the way it approached the conditions of approval in balancing the positive and negative impacts of the Project. This involved stating that in the absence of conditions being imposed, the predicted negative impacts would warrant refusal, however thereafter granting approval together with conditions of approval in relation to Scope 1 and Scope 2 emissions that were hypothetical or aspirational such that the Commission could have no certainty that the conditions would minimise greenhouse gas emissions.

139 Further, although the Commission found that Scope 1 and Scope 2 emissions would have a negative impact and were a significant component of all greenhouse gas emissions, in relation to Scope 1 (fugitive) emissions, the Commission accepted the opinion of the Department that no condition could be imposed in relation to Scope 1 emissions. And, in relation to Scope 2 emissions, the Commission noted that MACH (as proponent) had simply committed to investigating whether it was reasonable or feasible to reduce Scope 2 emissions over the life of the Project and, as such, the obvious inference is that the Commission was not aware of the current feasible technology that could abate these emissions.

140 DAMSHEG therefore submits that in the absence of conditions that could abate Scope 1 and Scope 2 emissions at the present time, the Commission relied upon unknown possible future technology particularly in circumstances where the majority of fugitive emissions would mostly occur in the final 10 to 12 years of the life of the Project. This is evidenced by the Commission stating in its Reasons (at par (149)), that the proponent had committed to continue to “periodically evaluate technological advancements in fugitive emission

abatement technology and would implement additional reasonable and feasible fugitive greenhouse gas mitigation measures that may become available over the life of the Project", then stating (at pars (157)-(160)) that it imposes Conditions B31, B32, B34 and B36 for performance measures in relation to Scope 1 and Scope 2 emissions.

141 DAMSHEG submits that these conditions were aspirational, because, first, Condition B31 only provides that the proponent must "take all reasonable and feasible steps to … improve energy efficiency and minimise Scope 1 and Scope 2 GHGEs…"; second, Condition B32 requires the proponent to prepare an "Air Quality and Greenhouse Gas Management Plan" ('AQGGM Plan'); third, Condition B34 requires the proponent to periodically update the AQGGM Plan; and fourth, Condition B36 provides that the proponent must "comply with certain performance measures" in a table styled "Greenhouse gas performance measures" in relation to each of Scope 1 and Scope 2 emissions.

142 DAMSHEG therefore submits that the Commission acted irrationally or unreasonably in specifically finding that conditions of approval would mitigate the impacts of the Project. Particularly in circumstances where the conditions imposed were only in relation to Scope 1 and Scope 2 emissions and were purely aspirational and based upon the assumption that unclear and unquantifiable technologies may be available to be employed in order to improve the abatement of Scope 1 and Scope 2 greenhouse gas emissions throughout the life of the Project.

MACH's position

143 MACH primarily submits that the specific conditions referred to by DAMSHEG are "underinclusive" and that there are other conditions, not raised by DAMSHEG, which aim to mitigate Scope 1 and Scope 2 emissions (directly or indirectly) including A1, D1, D4, D5, D6, D7, D8, D11 and D13, which could not be suggested to be "aspirational", and that it was not legally irrational to be of the view that those conditions would be appropriate for mitigating negative impacts arising from Scope 1 or Scope 2 emissions. Further, the Commission considered that the conditions it imposed would be suitable for the purpose of *reducing* the potential negative impacts of the Project and that the Commission

did not purport to assert that the conditions were apt to avoid those negative impacts entirely.

144 MACH further submits that, in any event, the identified conditions being, B31, B32, B34 and B36 were neither “purely aspirational” nor “hypothetical” as they impose substantial, ongoing, binding obligations on the proponent. Specifically, Condition B31 involves the taking of “all reasonable and feasible steps to … improve energy efficiency and minimise Scope 1 and Scope 2 [emissions]…”, which is clearly not aspirational as it imposes an obligation to take “all” reasonable and feasible steps. Similarly, Condition B32 involves the preparation of an AQGGM Plan to be implemented to ensure “best practice management is being employed … to minimise the development’s Scope 1 and 2 GHGEs”; Conditions B34 and B35 require that within 12 months of approval of the AQGGM Plan and then every three years during the life of the mining operations, the AQGGM Plan is to be updated and implemented to include specific information in relation to Scope 1 and 2 emissions; and Condition B36 obliges compliance with specific “performance measures” including the provision of numerical limits on Scope 1 emissions and an obligation to minimise Scope 2 emissions.

145 Although DAMSHEG criticises the conditions because there are “no details … as to how the measures will be reached”, MACH maintains that the conditions remain binding obligations and notes that s 4.17(4)(a) of the EPA Act itself expressly authorises the imposition of conditions by reference to an outcome or objective to be achieved.

146 MACH submits that irrationality and unreasonableness in an administrative law sense have strict meanings and are not triggered in the circumstances in relation to the Commission’s conduct.

Consideration

147 Although as noted above at [132], it is well acknowledged that “a consent authority cannot rationally approve a development proposal that is likely to have some identified environmental impacts on the theoretical possibility that the environmental impact would be mitigated or offset by some unspecified and uncertain action at some unspecified and uncertain time in the future”:

Gloucester Resources Ltd v Minister for Planning [2019] NSWLEC 7; (2019) 234 LGERA 257 at [530], I do not consider that is the case in relation to the conditions that the Commission has imposed. In circumstances where DAMSHEG's argument in relation to this ground is solely put as an irrational or illogical form of reasoning, for the following reasons, I find that the Commission's consideration of the imposition of conditions (and the manner it expressed its findings) is not redolent of irrational and/or illogical reasoning.

148 While the Commission stated in Table 1 (at par (35)) of the Reasons):

> "In the absence of conditions being imposed on any grant of consent to the Application, the Commission considers that the predicted negative impacts of the Application would warrant refusal of the Application."

it further stated:

> "Nonetheless, the present Application represents a responsible application for continued coal production and an orderly extension of the Mount Pleasant Mine. The grant of consent to the Application facilitates and preserves economic and other benefits to the State and the region."

149 I find that, read in context, the Commission is referring to all of the "predicted negative impacts" and that the conditions imposed, properly considered, have the effect (as MACH submits) of "tipping the balance" from refusal to approval. I find that this is clear when the above commentary is considered with par (293) of the Reasons (reproduced in full in annexure "A" to this judgment), which provides:

> "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:
>
> > …
> >
> > • 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.
> >
> > …"

150 I find that the conditions highlighted by DAMSHEG, being B31, B32, B34 and B36, read with B35 (for convenience, these conditions are extracted at annexure "B" to this judgment), are not aspirational in the sense of being based upon hypothetical future possibilities such that it was illogical or irrational for the Commission to have either imposed them or find that they would be of

benefit. Read in context, each of the conditions noted has a proper relationship to the Project and the fact that there is clearly some reliance upon the prospect of improved technology can be seen as a reasonably well understood adaptive management tool in major projects of relative length and similarity. In particular, I note:

(1) B31(a) provides that the proponent is to “take all reasonable and feasible steps to”, inter alia, “improve energy efficiency and minimise Scope 1 and Scope 2 GHGEs generated by the development”; and B31(b)-(h) then further provide obligations in relation to air quality (including “minimise air quality impacts” – and “must take all reasonable and feasible steps”). These obligations are not hypothetical.

(2) B32 (under the heading “Air Quality and Greenhouse Gas Management Plan") provides for the preparation of an AQGGM Plan initially to be approved by the Planning Secretary (within six months of the commencement of the Project); and (a)-(f) prescribe what the AQGGM Plan must achieve.

(3) B33 restricts certain construction and/or extraction until the AQGGM Plan is approved by the Planning Secretary.

(4) B34 requires that within 12 months of approval of the AQGGM Plan and then every three years, the AQGGM Plan is to be updated and implemented to include specific information in relation to Scope 1 and Scope 2 emissions. Such as to review of all available greenhouse gas emissions abatement measures relevant to the Project (to the satisfaction of the Planning Secretary), economic considerations for the Project as well as other obligations set out in (c)-(e) including the reporting of compliance with specific “performance measures” which are detailed in a table in Condition B36 setting “Greenhouse gas performance measures” (for Scope 1 and Scope 2 emissions).

(5) B37 provides for the matters that the Planning Secretary will take into account in determining compliance with the performance measures set out in the table in Condition B36 including Commonwealth or State requirements (including the NGERS).

151 In the context of these conditions, as noted above, MACH draws the Court’s attention to Conditions A1, D1, D4, D5, D6, D7, D8, D11 and D12 (for convenience, these conditions are extracted at annexure “C” to this judgment). I have considered each of those conditions. On their own, they do not assist in the determination of this ground, however, read together, they are conditions that go some way to providing for adaptive management protocols, because although the conditions are not prescriptive in relation to Scope 1 and Scope 2 emissions, I accept that these conditions are sufficiently adapted to mitigating

Scope 1 and Scope 2 emissions arising from the Project as submitted by MACH.

152 Furthermore, taking into account the Commission's commentary and consideration in its Reasons (at pars (158)-(161)) (extracted at [41] above), with particular emphasis on par (161), I do not consider that the conduct (and findings) of the Commission in relation to the imposition of the conditions highlighted by DAMSHEG can be seen to be illogical and/or unreasonable.

153 For the above reasons, considering, but not repeating, the principles summarised at [28]-[32] above, I do not find that the Commission acted illogically and/or irrationally in forming the view that the noted conditions in relation to Scope 1 and Scope 2 emissions would mitigate the predicted negative impacts of those emissions. I find that it was open to the Commission to conclude that the conditions it imposed were adapted to reducing the predicted negative impacts of the Project's Scope 1 and Scope 2 emissions and that was the objective purpose of the imposition of the conditions.

154 Ground 4 is not made out.

Ground 5 – Public Submissions Ground

DAMSHEG's position

155 DAMSHEG submits that, by failing to consider its submissions in relation to the effect of Scope 3 emissions on climate change and the remaining carbon budget, the Commission failed to consider a mandatory consideration specified in s 4.15(1)(d) of the EPA Act requiring the Commission to consider "any submissions made in accordance with this Act or the regulations". Moreover, the Commission failed to apply its own mind to the issues raised including by obtaining an understanding of facts, circumstances and contentions set out in the submissions: *South East Forest Rescue Incorporated v Bega Valley Shire Council and South East Fibre Exports Pty Ltd* [2011] NSWLEC 250; (2011) 211 LGERA 1 at [138] (Preston J).

156 DAMSHEG submits that the obligation in s 4.15(1)(d) must be understood in the context of ss 2.21 and 2.22, and cl 20(2)(d) in Pt 1 of Sch 1 to the EPA Act which impose mandatory requirements for community participation during the exercise of relevant planning functions. In particular, the Commission did not

comply with the obligation imposed by cl 20(2)(d) in Pt 1 of Sch 1, which requires the Commission to specify "how community views were taken into account in making the decision".

157 DAMSHEG points to its submissions to the Commission including its detailed written submissions accompanied by expert reports prepared by Prof Sackett, Ms Hutley, and Mr Nicholas, and again directed the Court to the extensive material before the Commission summarised in MFI 4 (noted at [100] above) and the evidence summarised at [46] above.

158 DAMSHEG again highlights Prof Sackett's evidence that the characterisation of CO2 emissions as Scope 1, Scope 2 or Scope 3 makes no material difference to the impact of those emissions from the Project on the NSW environment and, as such, Scope 3 emissions must be included in considering the environmental and social impacts of the Project. Importantly, Prof Sackett indicated that only about eight years remain at current emission levels before the remaining global carbon budget to hold warming to 1.5°C with at least a 67% chance is exhausted; and that in order to have at least a 50% chance of holding warming to 1.5°C, 89% of coal reserves must not be extracted.

159 DAMSHEG submits that although the Commission referred to greenhouse gas emissions as a "key issue", and grappled with Scope 1 and Scope 2 emissions, it did not engage with the submissions on Scope 3 emissions including in relation to the world's remaining carbon budget and, in addition, it disregarded the submissions about Scope 3 emissions when "generally recognising" the concerns expressed about the impact of Scope 3 emissions before stating, in its Reasons (at par (153)), "however, the Commission notes that under the Paris Agreement, Scope 3 emissions are attributed to the country within which they are emitted". While the Commission acknowledged the existence of Scope 3 emissions and that they contributed, in some unqualified sense, to climate change, it did not address the issue further or consider their acceptability.

160 DAMSHEG submits that although the Commission was not required to agree with the submissions and evidence, it was required to consider those submissions via an active intellectual process: *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177; [2021] HCA 12 at [12],

[77] (Kiefel CJ, Gageler, Gordon and Steward JJ); *Singh* at [30]-[34]. DAMSHEG submits the apparent disjunct between the accepted concerns about the existential threat of climate change and the fact that Scope 3 emissions account for 98% of the Project's anticipated emissions (which dwarf the Scope 1 and Scope 2 emissions), leads to the conclusion that the submissions (and evidence) on the impact of Scope 3 emissions was not considered by the Commission.

MACH's position

161 MACH submits that although the Commission is obliged to consider submissions, it is not obliged to refer to all submissions in its Reasons particularly in circumstances where the Commission received 198 written submissions and heard from 49 speakers. The Commission's duty specified in s 4.15(d) of the EPA Act was simply to consider the submissions. As such, it should not be inferred that the Commission did not consider the submissions made to as it repeatedly indicated in the Reasons that it had considered the submissions.

162 In these circumstances, MACH submits that the Commission was not obliged to refer in terms to Prof Sackett's evidence in relation to the "carbon budget" in order for that evidence be taken into account by the Commission, particularly since it plainly took into account that the Project would contribute to climate change and that the Scope 3 emissions, with other sources of greenhouse gas emissions, will have a cumulative impact. The form of the Commission's expression that Scope 3 emissions were "appropriately regulated and accounted for through the broader national policies and international agreements (such as the Paris Agreement)" (at pars (150)-(151)), involves an implicit engagement with the arguments advanced through the evidence of Prof Sackett.

163 In relation to DAMSHEG's reference to cl 20(2)(d) in Pt 1 of Sch 1 to the EPA Act, the duty in that clause was discharged by the Commission's repeated and clear indication that it had considered the submissions in the course of making its decision and its findings.

Consideration

164 Both parties implore the Court not to ignore the context of the proposed development in considering this ground. DAMSHEG points to the fact that the Commission was considering development approval for the extension of the mine in circumstances where Australia is the largest black coal exporter and the burning of coal is one of the key contributors of climate change and particularly where, in the present case, the projected Scope 3 emissions amount to 0.06% of the world's total yearly emissions.

165 MACH maintains that the context in which the Commission did not make specific reference to much of the material referred to by DAMSHEG is clear, being that there was no controversy in the Commission's mind about the existence of impacts associated with climate change.

166 While I note DAMSHEG's reference to the comments of Allsop CJ in *Minister for the Environment v Sharma* (2022) 291 FCR 311; [2022] FCAFC 35 at [1], that "the seriousness of the threat [of climate change and global warming] is demonstrated by the attention given to it by many countries around the world, and the attempts made by them to reach agreement and to co-operate to reduce the emission of carbon dioxide and other greenhouse gases…", this was not a matter about which there was true contention. The Commission accepted that estimated Scope 3 emissions amounted to 98% of all emissions from the Project, which as submitted by DAMSHEG, dwarf forecasted Scope 1 and Scope 2 emissions. For the reasons that follow, I find that the Commission's failure to isolate and/or recite Prof Sackett's evidence in circumstances where there were many submissions (both expert and lay) – many of which raised concerns in relation to the effect of the Project on climate change – does not indicate that the Commission failed, or neglected, to consider DAMSHEG's particular submissions.

167 I find that the failure to refer in detail to a number of the discrete submissions before the Commission (in particular, some or most the material identified in MFI 4) is not indicative of the fact that the Commission failed to consider DAMSHEG's submissions. In circumstances where the Commission noted on many occasions that it had considered the submissions before it, I am unable

to draw the inference that it ignored specific submissions and thereby did not discharge its legal duty. One reason is that there was no controversary about the negative impacts of climate change. I consider that in these circumstances, the Commission was not obliged to refer to each submission in its Reasons and its duty was to consider the submissions, not to summarise the matters before it.

168 Further, as considered in *Ceerose* at [66] and noted at [103] above, there is always a concern as to when a specific inference is to be drawn from the absence of a reference to a particular submission in a set of reasons because there is a range of possible explanations, only one of which is that the material was not considered. I do not consider that this inference arises here. It cannot be suggested that in circumstances where the Commission received approximately 1,000 written submissions and heard oral submissions from nearly 50 speakers, the failure to refer to Prof Sackett's otherwise undoubtedly important (and mostly uncontradicted evidence) about the carbon budget indicates a failure to consider. Moreover, there can be no doubt that the Commission was aware of contentions and submissions to the effect that approval would undermine State, national and international efforts to minimise greenhouse gas emissions (and meet Australia's Paris Agreement targets). The fact that the Commission did not accept this as determinative in its otherwise evaluative approach does not in my view amount to legal error.

169 DAMSHEG's position is that while the Commission grappled with Scope 1 and Scope 2 emissions in its Reasons, its consideration of Scope 3 emissions amounted to a mere acknowledgement of the existence thereof, and that they contributed to climate change. I consider the Commission's treatment of Scope 3 emissions does not demonstrate that the Commission had not considered DAMSHEG's submissions and, in particular, Prof Sackett's evidence.

170 I find that the Commission's commentary and findings in its Reasons (at pars (119), (127), (142), (150), (151), (152), (153), (161), (292) and (293)) are indicative that the Commission was aware of the submissions that had been made and that this includes "how community views were taken into account in making the decision" as required by cl 20(2)(d) in Pt 1 of Sch 1 to the EPA Act.

I also find that the Commission's frequent assertion and acknowledgement that Scope 3 emissions were counted elsewhere when viewed against my acceptance that there was no controversy in the Commission's mind about the existence of climate change in the context of the decision, does not lead to a conclusion that the Commission did not consider the submissions including the uncontested evidence about the likely impacts of Scope 3 emissions as a negative effect of the Project.

171 Despite these findings, while it is trite that the weight to be afforded to submissions and representations is a matter for the decision-maker, accepting that the requisite level of engagement (being the degree of effort needed) by the decision-maker with the submissions must occur within the bands of rationality and reasonableness: *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582; [2022] HCA 17 at [25] (Kiefel CJ, Keane, Gordon and Steward JJ), I do not find that the Reasons disclose that the Commission ignored, overlooked or misunderstood DAMSHEG's submissions.

172 Ground 5 is not made out.

Ground 6 – Surrender of Consent Ground

173 Ground 6 involves two steps: first, the Commission was obliged to consider the likely impacts of the proposed development; and second, the Commission considered the likely impacts arising from surface disturbance on some, but not all, of the area covered by the proposed development because it misapplied s 4.63(3) of the EPA Act. The parties agree that s 4.63(3) of the EPA Act (extracted later at [189]) provides that the Commission is not required to re-assess the impact of development already authorised by the existing consent. The key issue in dispute between the parties is in relation to the scope of the development authorised by the existing consent.

DAMSHEG's position

174 DAMSHEG submits that in circumstances where the existing consent (variously referred to in the parties' submissions as the "prior consent") was to be surrendered as a condition of approval for the Project, the Commission erred in its construction and application of s 4.63(3)(a) of the EPA Act and, as a consequence, failed to consider the full extent of the likely impacts of the

proposed development on biodiversity (due to the clearing of vegetation) within parts of the site. This was because not all of the area identified as "Project Continuation of Existing/Approved Surface Development" in "Figure 3 – Project Layout" in the Department AR ('Fig 3 – Annexure D') (for convenience, reproduced as annexure "D" to this judgment) could be lawfully cleared of vegetation under the existing consent.

175 DAMSHEG's concern arises because the proponent's BDAR only assessed the impacts on certain additional disturbance areas that would be cleared under the proposed development (referred to in Table 1 of the Department AR as "Additional Disturbance Area") however, the BDAR did not assess areas within the "Project Continuation of Existing/Approved Surface Development" identified in Fig 3 – Annexure D in the Department AR (some of which would be cleared under the proposed development but are areas that DAMSHEG maintains could not be lawfully cleared under the existing consent).

176 DAMSHEG also contends that none of the area within the "Approved Disturbance Area to be Relinquished" identified in Fig 3 – Annexure D (referred to in Table 1 of the Department AR as "Relinquishment Area") could have lawfully been cleared under the existing consent and although that area is not proposed to be cleared under the proposed development, the Commission determined (or accepted) that this would result in the avoidance of 485ha of native vegetation "that is approved to be cleared" in its overall assessment of the biodiversity impacts of the proposed development.

177 DAMSHEG maintains that MACH's contention (noted later in this judgment) that the existing consent authorises mining operations on the entirety of the site is wrong and that the conditions of the existing consent place limits on the mining operations that can be carried out on the site. Adopting the ordinary principles of construction of development consents, DAMSHEG contends that the plans approved under the existing consent do not show that mining operations were to be undertaken in what is now shown in Fig 3 – Annexure D as "Approved Disturbance Area to be Relinquished" and, moreover, provide for mining operations only in the south-eastern part of the area identified as "Project Continuation of Existing/Approved Surface Development" in Fig 3 –

Annexure D, with the result that clearing of native vegetation was only approved (in the existing consent) in areas actually required for mining operations.

178 DAMSHEG contends that Condition 2 of Schedule 2 of the existing consent provides that development must be carried out "generally in accordance with" various "project layout plans" (listed in Appendix 2 of the existing consent) specifically plans styled "Figure 2 – Conceptual Project Layout Plan at 2025" and "Figure 4 – Conceptual Final Landform" which, it submits, show (or provide for) mining operations limited to the south-eastern section of the site. These plans are not reproduced in this judgment.

179 DAMSHEG also points to, first, Condition 4 of Schedule 2 of the existing consent (which deals with inconsistency between documents); second, Conditions 5 and 6 of Schedule 2 (which place limits on the time in which mining operations may be commenced and the rate at which coal can be extracted); third, Condition 1 of Schedule 2 (which requires a person acting on the consent to minimise the harm to the environment); and fourth, Conditions 53 to 56 of Schedule 3 (dealing with rehabilitation after disturbance). DAMSHEG maintains that the effect of these conditions is that mining operations may only be carried out until 22 December 2026, and that the third modification of the original consent granted on 24 August 2018 ('MOD 3') made changes to the mining operations authorised under the consent by extending the time in which mining operations were permitted to be carried out (in Condition 5 of Schedule 2) and inserting the "project layout plans" shown in Appendix 2, which DAMSHEG maintains confine the mining operations to a smaller area of the site than prior to that modification.

MACH's position

180 MACH submits that the object of s 4.63(3) is apparent from its face such that when a development has been assessed there is no need to reassess it, and that the question of what development was "authorised by the consent to be surrendered", or "could have been carried out but for the surrender of the consent", requires consideration of the terms of the existing consent.

181 MACH submits that the existing consent (by way of Condition 5 of Schedule 2) provides that mining operations could be carried out (until 22 December 2026) on the "site". The meaning of "site" is discretely defined as "[t]he land listed in Appendix 1" which is styled "Schedule of Land" and lists all parcels of land comprising the "site" by reference to lot, section and deposited plan numbers and a map, such that the "site" covers the entirety of the area the subject of the existing consent.

182 As such, MACH reject's DAMSHEG's contention that Condition 2 of Schedule 2 of the existing consent limits mining operations to certain areas of the site. Instead, MACH submits that the development "authorised" (as relevant pursuant to s 4.63(3) of the EPA Act) by the existing consent was mining operations on the entirety of the site and that this is further established as Condition 2 of Schedule 2 provides that the development is to be carried out "generally in accordance with… project layout plans [shown in Appendix 2]". The "project layout plans" in the existing consent include "Figure 3 - Approved Surface Disturbance Plan" ('Figure 3 – Annexure E') (for convenience, reproduced as annexure "E" to this judgment) showing an area described as "Approximate Extent of Approved Surface Development" (variously referred to in submissions in this Court as the "pale taupe area"). MACH further notes that Condition 2 of Schedule 2 did not prohibit or impose any temporal limitations on surface development on the site within the pale taupe (or cream) area in Figure 3 – Annexure E.

183 MACH maintains that the existing consent did authorise at least surface disturbance of the site over the entirety of the pale taupe area in Figure 3 – Annexure E and this was the clear effect of Condition 5 of Schedule 2 of the existing consent. The pale taupe area depicts the "Approximate Extent of Approved Surface Development" and, as such, in accordance with the language of s 4.63(3) of the EPA Act, surface disturbance and surface development were "authorised" or "could have been carried out" on the site in the similar pale taupe area in Fig 3 – Annexure D.

184 MACH further submits that even if the effect of Figure 1 – Conceptual Project Layout Plan at 2021 and Figure 2 – Conceptual Project Layout Plan at 2025 (in

Appendix 2 of the existing consent) was that mining activities were “generally” to be confined to the south-eastern corner, that did not mean that surface development or disturbance was not authorised in the balance of the pale taupe area in Fig 3 – Annexure D. As such there was no error on the part of the Department (or the Commission) proceeding on the basis that the existing consent authorised surface disturbance in the entirety of the site (shown as the pale taupe area in Fig 3 – Annexure D) and assessing the Project on that basis.

Consideration

185 The essence of Ground 6 is DAMSHEG’s claim that the Commission failed to properly consider the impacts of the proposed development on biodiversity.

186 In considering this ground, which I consider turns on the construction of the existing consent, I am conscious that consent was originally granted on 22 December 1999 and that the original consent was modified on five occasions, most recently on 29 June 2022. As such, it is relevant to detail the Commission’s conduct and reasoning in relation to its consideration of the impacts of the clearance of vegetation on biodiversity.

187 In response to comments made by speakers at the public hearing, the Commission wrote to the Department on 11 July 2022 requesting further advice in relation to the assessment recorded in the Department AR. In this regard, the Reasons provide:

> “52. The Department confirmed that it relied on section 4.63 of the EP&A Act for part of its assessment of SSD 10418 (new development consent), due to the proposed surrender of DA92/97 (existing development consent). The Department stated:
>
> > 'In accordance with section 4.63(3) of the EP&A Act, the consent authority is not required to re-assess the impacts of the previously approved project. However, in this case, both the EIS and the Department's assessment for the new development consent (which includes parts of the continued development) has gone over and above this requirement and has considered all potential cumulative impacts, applying contemporary policy and technical guidelines, on key issues such as:
> >
> > - amenity (noise, air quality, blasting and visual assessments);
> > - water resources of the project's mining operations; and

> • other relevant matters (including final void and landform, traffic, social, economic, land use impacts (e.g. agricultural land) and greenhouse gas emissions).'

> 53. Further, the Department stated:
>
> > 'While under section 4.63(3) of the EP&A Act the Department is not required to re-assess the approved impacts for the continued development (approved under the existing development consent), technically it would be difficult to separate impacts of the approved project from those proposed, and therefore a contemporary assessment of the total impact of the Project was undertaken, including elements of the approved project.'
>
> 54. The Department stated that impacts in relation to biodiversity and heritage had not been assessed in this way, but had been assessed on an incremental basis allowed for under section 4.63(3):
>
> > 'This is because the approved biodiversity and heritage impacts for the continued development are related to a specific area of surface disturbance and technically the assessment methodology allows for these impacts to be assessed discretely on an incremental impact basis'.
>
> …
>
> 56. For the reasons set out in the Department's 14 July 2022 letter, the Commission considers that the assessment carried out by the Department, as recorded in the Department's AR, was materially conducted in an appropriate manner."

188 The Reasons show that the Commission agreed with the Department that the biodiversity impacts of the Project had been appropriately minimised and that the residual biodiversity impacts "can be appropriately offset" (at par (217)). Apart from the Commission's consideration of the Legless Lizard (further considered under Ground 7 later in this judgment), the Commission adopted the manner of assessment and the advice of the Department, and noted (at par (201)) that the Project includes the clearance of native vegetation and associated impacts to biodiversity comprising a disturbance area of up to 475ha of native vegetation and that "the Project also proposes to relinquish approval (under the Existing Approval) to disturb an area of 485ha ("relinquishment area") and as such, there is no significant net change to the overall disturbance area proposed". The Commission also noted (at par (202)) that the BDAR was prepared in accordance with the *Biodiversity Conservation Act 2016* (NSW) ('BC Act') and included biodiversity surveys of the proposed "additional disturbance area as well as consideration of the biodiversity values in the relinquishment area".

189 The parties accept that much of this ground turns on the application of s 4.63(3) of the EPA Act and the construction of the existing consent. Section 4.63(3) relevantly provides:

> (3) If a development consent is to be surrendered as a condition of a new development consent and the development to be authorised by that new development consent includes the continuation of any of the development authorised by the consent to be surrendered—
>
> > (a) the consent authority is not required to re-assess the likely impact of the continued development to the extent that it could have been carried out but for the surrender of the consent…

190 I consider that, properly construed, s 4.63(3) prevails over s 4.15(1)(b) and, in circumstances where s 4.63(3)(a) applies to a proposed development, the consent authority is relieved of the duty otherwise imposed by s 4.15(1)(b). Simply stated, a consent authority is relieved from the obligation to assess the likely impact of continued development which would have previously been assessed and found to be acceptable. As such, s 4.63(3)(a) necessarily involves the determination of the development "authorised" by the consent and the manner in which it is to be "carried out".

191 The principles of construction of development consents are uncontroversial. Development consents must be read in a commonsensical way and construed not as documents drafted with legal expertise but to achieve practical results, and the nature and extent of an approved development must be determined by construing the document of approval, here the existing consent (including any plans or other documents it incorporates), to establish the true meaning of the document as the unilateral act of the relevant authority and having regard to its enduring nature which encourages a fair but liberal reading of the rights it confers: *Westfield Management Limited v Perpetual Trustee Company Limited* [2006] NSWCA 245 at [36] (Hodgson JA); *Bunderra Holdings Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement)* (2017) 96 NSWLR 434; [2017] NSWCA 263 at [158] (Payne JA); *Snowy Monaro Regional Council v Tropic Asphalts Pty Ltd* [2018] NSWCCA 202; (2018) 362 ALR 359 at [34]-[35] (Bathurst CJ). Nevertheless, general principles of statutory construction can be of assistance, in particular, adopting a construction that produces a harmonious result and to give meaning to every word of its provisions.

192 Considering the above principles, for the following reasons, and adopting the submissions of MACH at [181]-[183] above, I find that the existing consent provides for surface disturbance across the entirety of the pale taupe (or cream) area in Figure 3 – Annexure E (being part of the "project layout plans") with the result that in the language of s 4.63(3), surface disturbance was "authorised" or "could have been carried out" in the pale taupe area and, as such, the Commission has not erred in its application of s 4.63(3)(a) of the EPA Act and has not therefore failed to consider the predicted negative impacts of the Project on biodiversity.

193 The starting point is the terms of the existing consent. Condition 5 authorises "mining operations" on the "site" and Schedule 1 describes the development for which approval has been given as "Construction and operation of the Mt Pleasant open cut coal mine and associated infrastructure".

194 Conditions 2, 4 and 5 in Schedule 2 provide as follows (emphasis added):

> "2. The applicant must carry out the development:
>
> > (a) generally in accordance with the EIS, EA (MOD 1), EA (MOD 2), EA (MOD 3), EA (MOD 4) and **project layout plans**; and
> >
> > (b) in accordance with the Statement of Commitments and conditions of this consent.
> >
> > *Notes:*
> >
> > - *The **project layout plans** are shown in Appendix 2.*
> > - *The Statement of Commitments is reproduced in Appendix 3.*
>
> …
>
> 4. The conditions of this consent and directions of the Secretary prevail to the extent of any inconsistency, ambiguity or conflict between them and a document/s listed in condition 2(a) above. In the event of an inconsistency, ambiguity or conflict between any of the document/s listed in condition 2(a) the most recent document prevails to the extent of the inconsistency, ambiguity or conflict.
>
> …
>
> 5. The Applicant may carry out **mining operations** on the **site** until 22 December 2026.
>
> > …"

195 Relevantly, "Mining operations" is defined in the existing consent as:

> "The carrying out of mining including the extraction, processing, stockpiling and transportation of coal on the Site and the associated removal, storage and/or placement of vegetation, topsoil overburden and reject material."

196 As noted above (at [181]), "site" is defined as "[t]he land listed in Appendix 1" which is a schedule of all parcels of land which comprise the entirety of the area the subject of the existing consent and the "project layout plans" referred to in Condition 2(a) are in Appendix 2 of the existing consent, and comprise "Figure 1 – Conceptual Project Layout Plan at 2021", "Figure 2 – Conceptual Project Layout Plan at 2025", "Figure 3 – Approved Surface Disturbance Plan" (defined in this judgment as Figure 3 – Annexure E) and "Figure 4 – Conceptual Final Landform".

197 I consider the conditions noted (and the incorporated "project layout plans") provide for mining activities to be undertaken on the entirety of the site. Although DAMSHEG points to a number of changes brought about by earlier modifications to the original consent, none of those sought to, or effected, the narrowing of the concept of the defined development being "Construction and operation of the Mt Pleasant open cut coal mine and associated infrastructure", nor narrowed the definition of "site".

198 Although DAMSHEG attaches more significance to "Figure 1 – Conceptual Project Layout Plan at 2021" and "Figure 2 – Conceptual Project Layout Plan at 2025" (in Appendix 2 of the existing consent), those figures although indicating "Active Mining Area" and "Active Overburden Emplacement Area" do not supplant the identification of "Approximate Extent of Approved Surface Development" in Figure 3 – Annexure E and, I find, do not purport to be a complete statement of what has been approved especially in relation to "surface disturbance", even accepting that some areas described in the existing consent as "active infrastructure area" and "rehabilitation area" had changed in MOD 3.

199 Further, to the extent that "Figure 4 – Conceptual Final Landform" (in Appendix 2 of the existing consent) is also relied upon by DAMSHEG, I note that it only provides for a "Conceptual Final Landform" and does not purport to define what vegetation clearance may be permitted as it relates primarily to rehabilitation. In addition, Condition 2 provides "generally in accordance with", which, in my

view, militates against a narrow construction and must be seen to facilitate a liberal construction especially in relation to a large open cut coal mine.

200 For the above reasons, I find that the existing consent, more particularly Condition 5 (incorporating the definition of “site”) and Figure 3 – Annexure E (specifically adopted pursuant to Condition 2 of Schedule 2 of the existing consent) provides appropriate indication as to the area in which surface disturbance was authorised.

201 Ground 6 is not made out.

Ground 7 – Lizard Ground

202 As noted at [14] above, after the public hearing on 7 and 8 July 2022, the Commission was informed by the Department (acting upon material from MACH) that the Legless Lizard recorded on the site was likely to be a species not previously identified and as such had not been listed as “threatened” under the BC Act. The Commission considered advice from the Department's Biodiversity Conservation Division (‘BCD’) stating that “because little is known about the species and its conservation needs such that land-based offsets [may] not be sufficient to mitigate impacts … based upon the information available to date it is apparent that further surveys and research are needed to effectively manage and protect the species in the wild”.

203 The Commission stated in its Reasons (at par (220)) that it “agrees with both the Department and BCD that impacts to this species on Site are capable of being managed through appropriate conditions of consent” and in granting approval, the Commission imposed conditions requiring, first, that biodiversity credits are to be retired if the Legless Lizard is listed as a threatened species under the BC Act and/or the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (‘EPBC Act’) during the life of the consent (Condition B62); second, that a biodiversity management plan be prepared to the satisfaction of the Planning Secretary and implemented (Conditions B63 and B65); and third, that the biodiversity management plan must demonstrate how the proposed development will be carried out in a manner that “avoids or minimises to the greatest extent practicable any serious or irreversible damage to the survival of the [Legless Lizard]” (Condition B63(j)).

DAMSHEG's position

204 DAMSHEG contends that the Commission failed to consider the impacts of the proposed development on the Legless Lizard as required by s 4.15 of the EPA Act because it deferred consideration of the impacts on the species until after consent was granted and delegated consideration of that issue to the Planning Secretary.

205 DAMSHEG submits that as Condition B63(j) requires the proponent to demonstrate (in the biodiversity management plan) how the proposed development will be carried out in a manner that avoids or minimises to the greatest extent practicable any serious or irreversible damage to the survival of the Legless Lizard, it does not impose a "clear limit" on the impact of the proposed development on the Legless Lizard. As such, the grant of the consent subject to this condition amounts to a constructive failure to determine whether the proposed development ought to be approved and on what conditions it ought to be approved.

206 DAMSHEG contends that the potential impacts on the Legless Lizard by the Project are critical to the decision of whether or not to approve the proposed development and the Commission has not simply delegated to the Planning Secretary a supervisory role of some aspect of the proposed development but has, in fact, delegated the actual assessment of the impacts, which otherwise was required to be undertaken by the Commission itself. DAMSHEG contends that Condition B63 could alter the Project in a fundamental respect because it is not known whether the proposed development (or any aspect of it) will cause any serious or irreversible damage to the survival of the species and it is not known what measures will be required to avoid to the "greatest extent practicable" any serious or irreversible damage to the survival of the species. That question, and consequently the question of what development can be carried out, is inappropriately left to the Planning Secretary to resolve.

MACH's position

207 MACH accepts that the Legless Lizard was encountered on the site when little was known about the species and that "further surveys and research are needed to effectively manage and protect the species in the wild" (at par (213)

of the Reasons). However, MACH submits that the Commission formed the view that the species located on the site was capable of being managed through appropriate conditions of consent (being Conditions B62, B63 and B65). As such, the imposition of such conditions did not defer or delegate consideration of the impacts of the proposed development on the Legless Lizard to the Planning Secretary.

208 MACH submits that it is possible to take into consideration the likely impacts of the proposed development “even though the full significance of such impacts cannot be known with precision”: *Zhang v Canterbury City Council* (2001) 51 NSWLR 589; [2001] NSWCA 167 (‘*Zhang*’) at [83] (Spigelman CJ). And, it is clear that the Commission took into account the potential impacts of the proposed development on the Legless Lizard in its Reasons. It was not necessary for the Commission to know precisely what would occur in order for the potential impacts to be taken into account and the Commission took into account such impacts at the appropriate level of generality. MACH contends that a consent would never be able to be granted if the standard a consent authority needed to meet was knowledge of the precise outcome of a potential impact.

209 MACH submits that the Commission received and accepted advice from the BCD that further surveys and research were needed to effectively manage and protect the species. In direct response to that advice, the Commission imposed Condition B63(i) requiring MACH to obtain further surveys and undertake further research in relation to the Legless Lizard.

210 MACH submits that Condition B63, by requiring a biodiversity management plan to be prepared to the satisfaction of the Planning Secretary, was, in fact, a dual requirement because the plan must, first, meet the necessary conditions in subparagraphs (a)-(m); *and* second, be to the satisfaction of the Planning Secretary. The Commission did not give the Planning Secretary the power to determine the impacts of the proposed development on the species rather, the Planning Secretary was given the power to approve measures to ameliorate the known impacts, namely, habitat loss and potential impact on species viability.

211 MACH submits that the Commission did not leave for later consideration an important aspect of the development where such decision could alter the Project in a fundamental respect because the implementation of Condition B63(j) could not alter the proposed development in a fundamental respect: *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734; (1991) 73 LGRA 349 at 740 (Clarke JA).

212 MACH further submits that conditions of consent do not need to have a "clear limit" as submitted by DAMSHEG, and that the line of authority considered in *Ulan Coal Mines Limited v Minister for Planning and Moolarben Coal Mines Pty Limited* [2008] NSWLEC 185; (2008) 160 LGERA 20 ('*Ulan*') relied upon by DAMSHEG, does not assist their position. In any event, as noted by Preston J at [78] of *Ulan*, "[r]etention of practical flexibility, leaving matters of detail for later determination, and delegation of supervision of some stage or aspect of the development, may all be desirable and be in accordance with the statutory scheme".

Consideration

213 As DAMSHEG contends that the Commission constructively failed to exercise its statutory power under s 4.15(1) of the EPA Act by deferring and delegating for later consideration the impacts of the proposed development on the Legless Lizard, and MACH points to the Reasons and the conditions imposed, it is appropriate to consider the Commission's conduct and findings more closely.

214 In Part 5.7 (Biodiversity) of its Reasons, the Commission recorded (at pars (201)-(209)) details of the proposed development and the background to various concerns relating to the clearing of vegetation, areas of disturbance and a number of biodiversity assessment reports including the BDAR. The Commission detailed (at pars (210)-(216)) the further consideration given to the Legless Lizard after the public hearing. Under the heading "Commission's Findings", the Commission stated:

> "…
>
> 220. The Commission agrees with both the Department and BCD that impacts to this species on Site are capable of being managed through appropriate conditions of consent. The Commission has therefore imposed specific requirements for the Applicant's Biodiversity Management Plan, which – among other relevant requirements – requires the Applicant to demonstrate

how the Project will be carried out in a manner that avoids or minimises to the greatest extent practicable any serious or irreversible damage to the survival of *Delma vescolineata*, irrespective of whether it is listed as a threatened species under the BC Act and/or EPBC Act. Condition B62 imposed by the Commission sets out biodiversity credit requirements should the species be listed under the BC Act and /or the EPBC Act during the life of the consent. The Commission agrees with BCD that some offset obligations could be met by funding a conservation strategy for the species under the Saving our Species 2016-21 program.

221. The Commission also agrees with BCD and the authors of Zootaxa (2022) that further investigations should be undertaken to support the management of this species. The Commission agrees with BCD that based on the information available to date, further surveys and research are needed to effectively manage and protect the species in the wild. The Commission has therefore imposed via condition B63(i) a specific requirement for the Applicant to investigate and identify habitat that supports populations in the wild of *Delma vescolineata*, as well as identifying and implementing measures to manage threats to that population.

222. The Commission acknowledges concerns raised in submissions regarding habitat loss and the subsequent viability of *Delma vescolineata*. The Commission has imposed condition B63(j) which states that the Applicant must demonstrate how the Project will be carried out in a manner that avoids or minimises to the greatest extent practicable any serious or irreversible damage to the survival of *Delma vescolineata*.

…"

215 The conditions referred to in the findings of the Commission and the parties' submissions relevantly provide:

"**Biodiversity Credits Required -** ***Delma vescolineata***

B62. If the Legless Lizard, *Delma vescolineata*, is listed as a threatened species under the BC Act and/or EPBC Act during the life of this consent, or otherwise agreed by the Planning Secretary, the Applicant must retire the applicable biodiversity credits (consistent with the applicable Biodiversity Risk Weighting as per the relevant row in Table 9) within 2 years of the species being listed as a threatened species under the BC Act and/or EPBC Act.

The retirement of credits must be carried out in consultation with the Planning Secretary and BCD and in accordance with the Biodiversity Offsets Scheme of the BC Act, including the application of Ancillary Rules: Biodiversity conservation actions that may be relevant to *Delma vescolineata* published under clause 6.5 of the *Biodiversity Conservation Regulation 2017*.

…

Biodiversity Management Plan

B63. The Applicant must prepare a Biodiversity Management Plan to the satisfaction of the Planning Secretary. This plan must:

(a) be submitted for approval prior to the commencement of development under this consent;

(b) be prepared by a suitably qualified and experienced person/s whose appointment has been endorsed by the Planning Secretary;

(c) be prepared in consultation with BCD;

…

(h) describe the measures to be implemented on the site to:

…

(vi) manage potential impacts to *Delma vescolineata*, if it is listed as a threatened species under the BC Act and/or EPBC Act in consideration of any relevant Commonwealth Conservation Advice, Recovery Plan and Threat Abatement Plans;

(i) investigate and identify habitat that supports populations in the wild of *Delma vescolineata*, and identify, and where relevant, implement measures to remove threats to that population;

(j) demonstrate how development under this consent will be carried out in a manner that avoids or minimises to the greatest extent practicable any serious or irreversible damage to the survival of *Delma vescolineata*;

…

(m) include details of who would be responsible for monitoring, reviewing, and implementing the plan.

…

B65. The Applicant must implement the Biodiversity Management Plan as approved by the Planning Secretary."

216 Given the framework of the Reasons, in particular the commentary (at par (220)), and the specific conditions imposed in relation to the Legless Lizard which was not listed as a threatened species under the BC Act or the EPBC Act, I find that the reasoning and the imposition of the above conditions was an appropriate response to any suggested uncertainty as to potential impacts on the Legless Lizard. As such, I do not find that the Commission has left undetermined the issue of consideration of potential impacts to be determined by the Planning Secretary. The manner in which the conditions are expressed does not in my view cause the development consent to lack finality in circumstances where provision is made, specifically in Condition B62, for specific conduct if the Legless Lizard is listed as a threatened species under the BC Act and/or under the EPBC Act during the life of the consent, or indeed otherwise agreed by the Planning Secretary with the effect that MACH must retire the applicable biodiversity credits.

217 The preparation of the biodiversity management plan in the manner provided for in Condition B63, and the requirement for its implementation in Condition B65, confirms that the Commission agreed with both the Department and the BCD that any impacts on the species are capable of being managed through appropriate conditions of consent. Although these conditions require that the biodiversity management plan demonstrates how the Project will be carried out in a manner that avoids or minimises to the greatest extent practicable any serious or irreversible damage to the survival of the Legless Lizard (again irrespective of whether it is listed as a threatened species or otherwise), I find that this indicates that the Commission was aware of the concerns raised in submissions regarding such matters as habitat loss and possible loss of viability.

218 In evaluating the Reasons (at pars (217)-(223)), it is clear that although the Commission formed the view that further surveys and research were needed to effectively manage potential impacts and protect the species, this could be achieved by way of imposing appropriate conditions of consent. I find that the Commission's reasoning indicates that there was an assessment of the potential impacts and that any impacts could be sufficiently managed through the various conditions. Further, I accept that a consent authority does not need to understand – in any final way or with precision – the precise nature of the potential impacts in order to take them into account: *Zhang* at [83].

219 I accept MACH's submission that the Commission took into account the potential impacts at the appropriate level of generality in view of the material before it. The requirement for there to be a plan of management which meets the necessary conditions in subparagraphs (a) and (m) of Condition B63, as well as being to the satisfaction of the Planning Secretary, is not redolent of error. I find that the Planning Secretary was not delegated the power to determine the impacts of the Project on the Legless Lizard, but rather, was given the power to approve measures to ameliorate the known potential impacts – namely, habitat loss and potential impact on species viability.

220 It follows that I do not find that the conditions leave an inappropriate or unlawful opening for later consideration of an important aspect of the development. I do

not consider that any further developments nor the implementation of Condition B63(j) in relation to the Legless Lizard could alter the Project in a fundamental respect. I accept MACH's contention that even with the imposition of Condition B63, the proposed development would remain a mining development approved subject to conditions of consent.

221 I do not accept DAMSHEG's position that, unless there is a "clear limit" on the impact of the proposed development on the species, then the condition(s) are beyond power. DAMSHEG in reply submissions, asserts that this ground is not concerned with the validity of conditions but rather the Commission's deferral and delegation of an important consideration as to whether the Project can have a serious or irreversible impact on the Legless Lizard to the Planning Secretary. However, in circumstances where I consider that s 4.38(1)(a) of the EPA Act entitles a consent authority to determine a development application in respect of SSD by granting consent "on such conditions as the consent authority may determine", I consider that the present conditions are not uncertain as to be outside of the power for the Commission to approve this SSD: *Ulan* at [77], [80]. In addition, I note that there is no common law principle that the exercise of statutory power must be certain and final in order to be valid where a condition may only be invalid, by lacking in certainty or finality, if it falls outside of a class of conditions which the statute expressly or impliedly permits: *Ulan* at [49]-[50].

222 Further, Div 4.7 of the EPA Act specifically deals with SSD and s 4.38(1)(a) mostly relates to large scale, complex development where, and as noted in *Ulan* at [78], retention of practical flexibility in implementing a development including its conditions are likely desirable.

223 In the above circumstances, I accept the submission of MACH that conditions B63(i) and (j) (along with the other conditions referred to above) are beneficial conditions which are calculated to have the effect of narrowing the impacts of the Project on the Legless Lizard over time and although not directed to the precautionary principle (as was being considered in *Ulan* at [99]), these are conditions which provide for an adaptive management response which is an acceptable approach in dealing with uncertainty as to potential impacts.

224 Ground 7 is not made out.

Ground 8 – Air Quality Ground

DAMSHEG's position

225 DAMSHEG contends that the Commission failed to adhere to the standard of reasonableness in reaching the following related conclusions, first, in the Reasons (at par (121)), that the air quality impacts "can be adequately minimised, managed or at least compensated to achieve an acceptable level of environmental performance"; and second, (at par (270)), that there are "no significant adverse social impacts anticipated" by the Project.

226 DAMSHEG points to various material before the Commission including MACH's Human Health Assessment report (in Appendix R to the EIS) which provided a health impact assessment with respect to both incremental and cumulative air quality impacts arising from the Project. The report recognised the health impacts of exposure to particulate matter ('PM'), particularly PM2.5 and PM10, and stated:

> "The available evidence does not suggest that there is a threshold below which health effects do not occur. Hence there are likely to be health effects associated with background levels of PM2.5 and PM10 even where the concentrations are below the current guidelines."

227 DAMSHEG points to public submissions which raised concerns about emissions from the Project in the context of the existing poor air quality in Muswellbrook and surrounding areas including advice in a letter dated 12 March 2021 from Hunter New England Local Health District to the Department, which relevantly stated:

> "…Muswellbrook is already experiencing in all years, PM2.5 levels which exceed the current NEPM standards … The results show multiple exceedances of PM10 levels.
>
> There is no evidence of a threshold below which exposure to particulate matter (PM) is not associated health effects.
>
> Therefore, it is important that all reasonable and feasible measures are taken to minimise human exposure to PM, even where assessment criteria are met. Both the modelling, and the actual air monitoring results for Muswellbrook (2012 – 2019), show exceedances of NEPM standards for PM10 and PM2.5. …"

228 The advice further noted that while there are already multiple sources contributing to the PM levels in the Muswellbrook area, this is not an

acceptable reason allowing further increases to PM levels that may impact on the health of local residents.

229 DAMSHEG provided the Court with a detailed summary of the material that was before the Commission relating to adverse health impacts arising from the “air pollution” that affects residents living in Muswellbrook and surrounds (MFI 5), which DAMSHEG submits also constitute social impacts. The material included various annexures to the EIS, expert reports of Dr da Silva and Dr Askland, a number of the submissions made to the Commission, and references to the transcript of oral submissions made during the public hearing.

230 DAMSHEG submits that the Department AR, despite noting that the predicted residual air quality impacts are not insignificant and extend the impacts of the existing mine due to its extended operation period, concluded that the impacts of the Project can be adequately minimised, managed or at least compensated to achieve an acceptable level of environmental performance. DAMSHEG notes that the Department did not refer to the fact that there were likely to be health impacts associated with air emissions from the Project even where dust criteria are met.

231 DAMSHEG submits that the Commission disregarded MACH’s own evidence (noted at [226] above) that the local area had higher levels of cardiovascular and respiratory disease, and points to the reports of Dr da Silva and Dr Askland provided by DAMSHEG which were not identified in the Reasons (at par (111)), where, as noted above at [39], the Commission listed the seven expert reports it had considered in relation to air quality impacts.

232 DAMSHEG submits that the Commission’s conclusion that the air quality impacts from the Project can be minimised, managed or at least compensated to achieve an acceptable level of environmental performance, was legally unreasonable in circumstances where there was compelling evidence before the Commission to the following effect: first, that there is no threshold below which exposure to PM is not associated with health risks and that the Project will have an incremental (that is increased) impact on health risks in the local area; second, that the local area already experiences concentrations above acceptable air pollution (and PM) standards from time to time; and, third, that

concern regarding cumulative air quality impacts has been expressed through public submissions and the Hunter New England Local Health District. Despite this evidence, DAMSHEG submits that the Commission failed to make findings in relation to the health impacts (and associated and related social impacts) on the local community as a result of dust and air pollution. As such, the Commission's conclusion in its Reasons (at par (121)) was incompatible with the undisputed evidence before it and was so unreasonable that no reasonable decision-maker could have made that decision.

233 Similarly, and repeating the above submissions, DAMSHEG further submits that the conclusion in the Reasons (at par (270)), that there were “no significant adverse social impacts anticipated” was also legally unreasonable because it was incompatible with the health impacts referred to in the material before the Commission such that no reasonable decision-maker could have reached that conclusion.

MACH’s position

234 MACH accepts that while the Commission was obliged to act in a legally reasonable way, it clearly made specific findings in respect of air quality as articulated in the Reasons (at par (121)), finding that there was “no significant adverse social impacts anticipated”. As such, MACH rejects the contention that the Commission was unreasonable.

235 MACH contends that the Commission was conscious of the impact of the Project on air quality and took that into account and that the evidence before the Commission was that the incremental impact of the Project on PM emissions would generally be $<1\mu g/m^3$. In any event, the Commission specifically considered the objections and submissions to the proposed development that were based on air quality impacts and, having considered those impacts, imposed Conditions B28 to B30 obliging the proponent to ensure that all reasonable and feasible measures are employed to ensure that PM standards are not exceeded. Furthermore, the Commission adopted specific standards in Condition B28 based on the NSW Environment Protection Authority (‘EPA’) Air Quality Assessment Standards (including “Approved Methods for the Modelling and Assessment of Air Pollutants in New South

Wales”). MACH submits there is nothing legally unreasonable in setting standards that the proponent is required to meet by reference to the EPA standards.

236 MACH further submits that the Commission’s view was not that the proposed conditions would *avoid* all PM emissions or potential negative impacts but that the conditions imposed would have the effect that the impacts were “adequately minimised [or] managed … to achieve an acceptable level of environmental performance” (at par (121) of the Reasons). Moreover, it is clear that the Commission was aware that this is a mining project where benefits and detriments are inevitable and as such there was no error in the Commission's approach.

237 In relation to social impacts, MACH submits that the Commission was not of the view that there were no adverse social impacts but was of the view that there were no “significant adverse social impacts” in its Reasons (at par (270)). The Commission clearly took into account potential negative social impacts and concluded that the positive social benefits (including employment) outweigh those negative impacts. As such, legal unreasonableness is not established by pointing out that the Commission did not accept all of the submissions made to it.

Consideration

238 The Commission’s consideration of air quality matters (including greenhouse gas emissions) is noted at [39]-[41] above. In its Reasons (at pars (110)-(124)), the Commission noted the expert reports and other material it had considered including evidence in relation to predicted exceedances of cumulative annual average air-quality criteria in the Department AR. The Commission also noted the objections to the Project received on the basis of air quality impacts. Having considered the material before it including MACH’s Supplementary Air Quality Advice and the Department’s Supplementary Air Quality Peer Review, the Commission found that the potential air quality impacts of the Project had been adequately assessed and imposed conditions requiring mitigation and management of those impacts. In doing so, the Commission recorded that it agreed with the Department AR and recognised that although the anticipated

impacts are similar to those of the existing consent, the impacts would be extended due to the Project's extended operation period up to 22 December 2048. Moreover, the Commission recorded that it was satisfied that the proponent had adequately addressed the EPA requirements and found in its Reasons (at par (121)) that the impacts of the Project can be adequately minimised, managed or at least compensated to achieve an acceptable level of environmental performance.

239 The Commission imposed Conditions B28 to B30 which set specific air quality criteria for the Project, and Condition B31 which details air quality and greenhouse gas operating conditions for the Project. Condition B31(c) requires the proponent to implement both proactive and reactive air quality mitigation measures "to ensure compliance with the relevant conditions of this consent".

240 In relation to various close receivers, the Commission imposed Conditions C1 and C12 to C19, which provides for land acquisition requirements in relation to those affected receivers. Furthermore, as considered at [150] above, the Commission imposed Condition B32 which requires the preparation of an AQGGM Plan that must set out the measures to be implemented to ensure compliance with the air quality criteria.

241 In the above circumstances, and conscious of the applicable legal principles at [28]-[32], I find that Ground 8 is not made out. My reasons may be shortly stated.

242 First, as it is not alleged that the Commission failed to consider either air quality or social impacts per se, the usual strictures about legal unreasonableness must be kept in mind, in particular that a decision is not legally unreasonable just because reasonable minds may reach a different conclusion about the correct or preferable decision (*Li* at [28]), and that it is rare to find unreasonableness where expressed reasons provide a justification for a determination (*SZVFW* at [84]). I find that the Commission adequately considered the submissions (and the evidence) marshalled before it in relation to air quality and associated impacts. The Commission received significant material directly related to air quality (to which my attention was specifically drawn by the summary of the relevant evidence in MFI 5). The Commission

noted the expert material in its Reasons at pars (110)-(118), with particular emphasis on the Department AR, and further expert material marshalled at the request of the EPA. The Commission noted the submissions from Muswellbrook Shire Council and Upper Hunter Shire Council each raising concerns relating to air quality. And, at pars (73)-(75), acknowledged that many submissions had been received raising concerns in relation to air quality and dust, and associated health impacts, and the exacerbation of the present poor state of air quality in the Hunter region due to many factors including farming and agriculture.

243 Further, given the extensive submissions and evidence in relation to greenhouse gas emissions (considered earlier in this judgment) and the Commission's analysis and conclusions specifically in relation to air quality in its Reasons (at pars (110)-(124)), I do not consider the failure to specifically refer to the reports of Dr da Silva and Dr Askland indicates that the Commission was not aware of the concerns raised therein.

244 Second, the Commission's imposition of the conditions noted at [239]-[240] above, clearly shows that the Commission was aware of, and sought to address, the concerns in relation to air quality (including PM) and formed the view that, with the imposition of conditions, the impacts (including air quality and social impacts) can be adequately minimised and managed and not avoided.

245 Third, the language of "adequately minimised, managed or at least compensated to achieve an acceptable level of environmental performance" in the Reasons clearly involves notions of evaluation and acceptability of the impacts and does not involve or imply a denial by the Commission that the Project has negative impacts, including health impacts. I find that the Commission was satisfied, particularly in light of the mitigation measures, that an acceptable level of environmental performance was able to be achieved. As submitted by MACH, even emphatic disagreement with such a conclusion does not equate with legal unreasonableness.

246 Fourth, I find that the Commission's conduct and conclusions, again, involved an evaluative judgment and polycentric decision-making. The above noted

reasoning shows that the Commission was not ignorant of the fact that PM is harmful. The Commission’s consideration provided in the Reasons involved the weighing of many factors (including both positive and negative impacts) in relation to the continuation and extension of mining activities on the site – albeit for a not insignificant period of time and clearly not without significant environmental and health impacts. Remaining conscious that the present proceedings involve judicial review and that the Commission in these circumstances enjoys certain decisional freedom, I consider that the finding in the Reasons (at par (121)) was one that was reasonably available to the Commission.

247 In relation to the second limb of Ground 8, the Commission's findings in relation to social impact in its Reasons (at par (270)) are as follows:

> “The Commission considers that the Applicant has assessed the social impact of the Application in sufficient detail. The Commission agrees with the Department that there are no significant adverse social impacts anticipated. The Commission is of the view that on balance, the social benefits associated with permanent and construction-related employment outweigh any potential negative social impacts.”

248 Although there were many submissions that raised the negative impacts of mining in the local community, it is clear that the Commission was aware of these matters and took into account, inter alia, the assessment in the Department AR, which concluded that the social impacts of the Project were essentially a continuation (with some obvious prolongation) of existing social impacts associated with the existing mine – including both positive and negative impacts. The Department advised that the negative social impacts generally focused on people who reside close to the mine (through amenity impacts such as noise and dust) while positive impacts were experienced by a wider geographic spread of residents (particularly by way of increased employment and economic opportunities). The commentary in the Department AR in relation to social impacts (including health impacts) was considered and adopted by the Commission in its Reasons (at pars (269) and (270)) where the Commission recorded the Department's assessment in relation to the proponent’s intention to implement “measures to mitigate negative social impacts, including stakeholder engagement, working with industry groups,

targeting local employment and training, and supporting Aboriginal stakeholder groups".

249 For the above reasons, I do not consider that the Commission failed to adhere to the standard of reasonableness in relation to its conclusions in its Reasons (at pars (121) and (270)).

250 Ground 8 is not made out.

Conclusion

251 DAMSHEG has not established any of the grounds of review of the Commission's decision to grant development consent to the Project. The amended summons should be dismissed.

252 The usual costs order in judicial review proceedings is that costs follow the event. The parties did not address at the hearing whether the Court, in the exercise of its discretion under r 4.2(1) of the Land and Environment Court Rules 2007 (NSW) or otherwise, should decide not to make an order that DAMSHEG pay MACH's costs of the proceedings. If MACH seeks its costs, it should file written submissions within three weeks of the date of this judgment and DAMSHEG should then file written submissions in response within a further three weeks. The question of costs will be decided on the papers unless either party makes an application for an oral hearing. If MACH does not seek an order that DAMSHEG pay its costs within the timeframe set out above, the Court will note that there is no order as to costs.

Orders

253 The orders of the Court are:

(1) The amended summons is dismissed.

(2) If MACH Energy Australia Pty Ltd ('MACH') seeks an order that Denman Aberdeen Muswellbrook Scone Healthy Environment Group Incorporated pay their costs of the proceedings, MACH is to file and serve written submissions on costs by 9 September 2024.

(3) If MACH does seek a costs order under Order (2), Denman Aberdeen Muswellbrook Scone Healthy Environment Group Incorporated is to file and serve written submissions on costs by 30 September 2024.

(4) If either party seeks an oral hearing on the question of costs, the party is to request an oral hearing in its written submissions filed under Order (2) or (3).

(5) The parties have liberty to restore the matter for directions on 2 days' notice.

Addendum and further Order (9 September 2024)

254 I gave judgment and made orders in these proceedings on 19 August 2024 providing MACH with an opportunity to consider whether it would seek an order that DAMSHEG pay its costs of the proceedings. As MACH has confirmed that it does not seek an order that DAMSHEG pay its costs, I make the following further order:

(1) No orders as to costs.

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Annexure A (158593, pdf)

Annexure B (138783, pdf)

Annexure C (150016, pdf)

Annexure D (2112218, pdf)

Annexure E (1361145, pdf)

Amendments

28 October 2024 - Addendum and further Order added at par [254].

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