

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, JAGOT AND BEECH-JONES JJ

MACH ENERGY AUSTRALIA PTY LTD

APPELLANT

AND

DENMAN ABERDEEN MUSWELLBROOK SCONE

HEALTHY ENVIRONMENT GROUP INC & ANOR RESPONDENTS

*MACH Energy Australia Pty Ltd v Denman Aberdeen Muswellbrook Scone
Healthy Environment Group Inc*
[2026] HCA 35
Date of Hearing: 13 May 2026
Date of Judgment: 7 October 2026
S174/2025

ORDER

- 1. Grant leave to the first respondent to file an amended notice of contention.*
- 2. Appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation

M A Izzo SC with J E Davidson SC, S H Hartford Davis and O J Ronan for the appellant (instructed by Ashurst Australia)

N L Sharp SC with S A C Patterson and M S E Thompson for the first respondent (instructed by Johnson Legal Pty Ltd)

Z C Heger SC with Z J Bush and R A Nanthakumar for Melbourne Climate Futures, appearing as amicus curiae (instructed by Equity Generation Lawyers)

B K Lim SC with J G Wherrett for the Union of Concerned Scientists, appearing as amicus curiae (instructed by Hall & Wilcox)

Centre for Climate Engagement at Hughes Hall, University of Cambridge and the Sabin Center for Climate Change Law at Columbia Law School, appearing as amicus curiae, limited to written submissions

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

MACH Energy Australia Pty Ltd v Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc

Administrative law – Judicial review – Where appellant sought development consent for project to extend and expand coal mine – Where Independent Planning Commission of New South Wales ("Commission") granted development consent – Where Scope 3 emissions constituted 98 per cent of project's total greenhouse gas emissions – Where no conditions to minimise Scope 3 emissions imposed – Whether Commission complied with obligation to consider "likely impacts of that development, including environmental impacts ... in the locality" – Whether Commission complied with obligation to consider imposing conditions aimed at ensuring greenhouse gas emissions minimised to greatest extent practicable.

Words and phrases – "climate change", "coal mine", "conditions", "consider", "consideration", "development consent", "duty to give reasons", "environmental impact statement", "environmental planning instrument", "global warming", "greatest extent practicable", "greenhouse gas emissions", "impact", "in the locality", "intended essential meaning", "interpretation of reasons", "judicial review", "jurisdictional error", "jurisdictional fact", "likely impacts", "mandatory relevant consideration", "materiality", "minimised to the greatest extent practicable", "Paris Agreement", "Scope 3 emissions".

Environmental Planning and Assessment Act 1979 (NSW), ss 4.15(1)(a)(i), 4.15(1)(b).

State Environmental Planning Policy (Resources and Energy) 2021 (NSW), cl 2.20(1)(c), 2.20(2).

The appeal and amended notice of contention

1 Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act") relevantly provides that:

"In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application –

(a) the provisions of –

(i) any environmental planning instrument ...

...

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

..."

2 The development the subject of the development application made by the applicant for development consent and the appellant in this appeal, MACH Energy Australia Pty Ltd ("MACH"), involved an extension of the operational life of the Mount Pleasant coal mine in the Hunter region of New South Wales, for a period of 22 years from its current end of extraction date of 22 December 2026 until 22 December 2048. This would enable the extraction of an additional 406 million tonnes of coal to be achieved by deepening part of the existing open cut mining area and increasing the mine's annual production rate of coal from 10.5 million tonnes per year to 21 million tonnes per year.

3 The development constituted "State significant development" in accordance with s 4.36 of the EPA Act. By s 4.5 of that Act, the Independent Planning Commission of New South Wales ("the Commission") was the consent authority for the development application. By s 4.40, s 4.15 applied to the determination of the development application. By s 4.38, the Commission as the consent authority was to determine the development application by "granting consent to the application with such modifications of the proposed development or on such conditions as the consent authority may determine" or "refusing consent to the application". By ss 2.21(1)(d) and 2.21(2)(b) the Commission was required, amongst other things, to carry out the "community participation" function in

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respect of the development application in accordance with Div 2.6 of Pt 2 of the EPA Act.

4 The development application was the subject of significant objection including from the first respondent, Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc ("DAMSHEG"). Many of the objections concerned the greenhouse gas emissions which the proposed development would generate. It was common ground at all times that those emissions could be described in the terms set out by the Commission in its reasons for decision as:

- "• 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 [greenhouse gas] 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."

5 The focus of this appeal was scope 3 emissions of greenhouse gases. It was not in dispute at any time during the Commission's consideration and determination of the development application that the extension of the operational life of the Mount Pleasant coal mine would involve scope 1, scope 2 and scope 3 emissions of greenhouse gases. The environmental impact statement ("the EIS") accompanying the development application identified these emissions. The EIS acknowledged that "all sources of greenhouse gas emissions will contribute in some way towards the potential global, national, [S]tate and regional effects of climate change" and that the development's "contribution to climate change, including the associated environmental impacts, would be in proportion with its contribution to global greenhouse gas emissions". The EIS estimated that the scope 3 emissions, resulting mostly from combustion overseas of the coal extracted from the Mount Pleasant coal mine, would represent approximately 0.065% of the total of anthropogenic global greenhouse gas emissions (excluding emissions from land use change) in 2017.

6 The EIS identified "inherent uncertainties" about climate change projections resulting not only from continuous modelling and predictive updates of such projections but also from the continuous adjustment and implementation of greenhouse gas emissions mitigation measures including by way of new technologies. Notwithstanding this, from the range of global, national, State and regional environmental impacts associated with global climate change, the EIS

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said that, amongst other things, the climate change projections indicated a likely rise in average temperatures in the region of the development suggesting that bushfires may become more prevalent in that area and that "rainfall has the potential to both increase and decrease, particularly seasonally, with heavier rainfall events likely to become more frequent".

7 DAMSHEG, amongst others, contended that the development application should be refused consent including because of the greenhouse gas emissions it would cause, which would contribute to global climate change. The Commission determined to grant consent to the development, subject to conditions.

8 DAMSHEG challenged the validity of the development consent in the Land and Environment Court of New South Wales on grounds including that the Commission had not complied with: (i) s 4.15(1)(b) of the EPA Act, by misconstruing that provision and thereby not considering, as required, the likely impacts of the development in terms of its scope 3 emissions; (ii) s 4.15(1)(a)(i) of the EPA Act, by not complying with applicable provisions of an applicable environmental planning instrument, *State Environmental Planning Policy (Resources and Energy) 2021* (NSW) ("the Resources SEPP"); and (iii) s 4.15(1)(d) and (e) of the EPA Act, which required the consent authority to "take into consideration ... as are of relevance to the development the subject of the development application" respectively "any submissions made in accordance with this Act or the regulations" and "the public interest".

9 The primary judge in the Land and Environment Court (Robson J) dismissed DAMSHEG's challenge on all grounds.¹ DAMSHEG appealed that decision to the Court of Appeal of the Supreme Court of New South Wales on two grounds, being those described in its amended notice of appeal alleging non-compliance with s 4.15(1)(a)(i) and (b) of the EPA Act. DAMSHEG made no appeal against the primary judge's dismissal of its claims relying on s 4.15(1)(d) and (e) of the EPA Act.

10 The Court of Appeal (Ward P, Adamson JA and Price A-JA) allowed DAMSHEG's appeal and held that the development consent was invalid on the sole ground that the Commission had not complied with s 4.15(1)(b) of the EPA Act in that: (i) s 4.15(1)(b), properly construed, required the Commission to consider the development's likely impacts on the environment in the locality of the development; and (ii) it should be inferred from the evidence that the Commission did not consider the development's likely impacts on the environment in the locality of the development by reason of the scope 3 emissions the development would cause and the contribution of those emissions to climate change and the

1 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* [2024] NSWLEC 86.

impacts of climate change in the locality of the development.² The Court of Appeal ordered that the matter be remitted to the Land and Environment Court to consider the application of Div 3 of Pt 3 of the *Land and Environment Court Act 1979* (NSW) to the development consent, enabling orders to be made for the validity or conditional validity of the development consent in specified circumstances rather than a declaration of invalidity of the consent.³

11 Pursuant to a grant of special leave to appeal, MACH contended that the Court of Appeal erred on three grounds: (i) construing s 4.15(1)(b) of the EPA Act as if it imposed a requirement to consider likely impacts of a development on the built and natural environment "in the locality"; (ii) construing s 4.15(1)(b) of the EPA Act as if it imposed a requirement to conduct a causal inquiry as to the impacts of climate change; and (iii) concluding that the impact of climate change is capable of being a likely environmental impact in the locality of the development within the meaning of s 4.15(1)(b) of the EPA Act.

12 DAMSHEG filed a notice of contention contending that the Court of Appeal erred in failing to find that the Commission contravened s 4.15(1)(a)(i) of the EPA Act by not complying with applicable provisions of the Resources SEPP, specifically s 2.20, which required the Commission to consider "whether development consent should be issued subject to conditions aimed at ensuring that greenhouse gas emissions (including downstream emissions) of the development are minimised to the greatest extent practicable". DAMSHEG sought leave during the hearing to file an amended notice of contention, which MACH opposed in part. The additional ground in the amended notice of contention contended that, if the Court of Appeal erred in its construction of s 4.15(1)(b) of the EPA Act, the Court of Appeal ought to have held that the development consent was invalid on a further ground that the Commission "was required to consider the likely impacts of climate change in NSW and the Hunter Valley because of the evidence before the Commission including the material in the" EIS.

13 Two further bodies, Melbourne Climate Futures and the Union of Concerned Scientists, were granted leave to be heard in the appeal. In addition, leave was granted to the Centre for Climate Engagement at Hughes Hall, University of Cambridge, along with the Sabin Center for Climate Change Law at Columbia Law School, to appear as amici curiae by way of written submissions.

2 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 290-291 [106]-[109], 319-320 [235]-[238], 321 [245].

3 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 293 [119]-[120], 294 [124], 321 [243].

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It is unnecessary for the submissions on behalf of these bodies to be discussed. As will be apparent, the appeal concerns the meaning and application of provisions of the EPA Act. It does not raise for consideration any issue concerning climate change outside of the meaning and application of the EPA Act. Nor does it concern any aspect of the merits of the development, which are extraneous to the questions in the appeal.

- 14 As will be explained, MACH's central ground of appeal, that the Court of Appeal misconstrued and therefore misapplied s 4.15(1)(b) of the EPA Act, must be allowed. MACH's remaining two grounds of appeal do not arise for consideration. While leave should be granted for DAMSHEG to rely upon its amended notice of contention, the amended notice of contention must be rejected on both grounds.

MACH's contention based on *Ross v Lane*

- 15 It is appropriate to deal at the threshold with MACH's contention, based on the reasoning in *Ross v Lane*,⁴ that even if the Commission had not considered the emission of greenhouse gases from the development, including scope 3 emissions, as a likely impact of the development by contributing to global climate change, that would not constitute a breach of the EPA Act potentially invalidating the development consent. If that contention were correct, it would render this appeal moot.

Ross v Lane

- 16 *Ross v Lane* concerned s 4.15(1)(a)(i) of the EPA Act, which (as noted) required a consent authority in determining a development application to take into consideration as of relevance to the development the subject of the development application the provisions of an environmental planning instrument. The environmental planning instrument in question was *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development* (NSW) ("SEPP 65"). Clause 4 of SEPP 65 provided that SEPP 65 applied to development described in part as "the substantial redevelopment or the substantial refurbishment of an existing building". If SEPP 65 applied, it required the consent authority to refer the development application to a design review panel for assessment of the development in accordance with certain design review principles set out in

4 (2022) 255 LGERA 136.

SEPP 65.⁵ The consent authority in that case granted a development consent having decided that SEPP 65 did not apply to a development.⁶

17 A majority of the Court of Appeal of the Supreme Court of New South Wales (Macfarlan JA and Basten A-JA; Beech-Jones JA dissenting on this point) held that the question whether or not the development answered the description of "the substantial redevelopment or the substantial refurbishment of an existing building" such that SEPP 65 applied was not a jurisdictional fact which a court must determine for itself.⁷ In so holding, Macfarlan JA and Basten A-JA distinguished an earlier decision, *Woolworths Ltd v Pallas Newco Pty Ltd*,⁸ in which the Court of Appeal (Spigelman CJ; Mason P, Handley and Sheller JJA and Cripps A-JA agreeing) held that the question whether a development was permissible with consent or prohibited under an environmental planning instrument was a question which a court on review was required to decide for itself.⁹

18 In support of the conclusion contrary to that reached in *Woolworths Ltd v Pallas Newco Pty Ltd*, Basten A-JA, with whom Macfarlan JA agreed, observed that "where a statute does not express itself in terms of the satisfaction or opinion of the repository of the power, such an intention may nevertheless [be] inferred from the nature of the power, the circumstances in which it comes to be exercised, and by reference to other principles relevant to the proper construction of a statute".¹⁰ His Honour reasoned, in effect, that as: (i) s 4.15(1) regulates the evaluation of a development application; (ii) the matters in s 4.15(1)(b)-(e) are plainly evaluative; and (iii) there would be considerable inconvenience if a consent authority's decision as to the applicability of an environmental planning instrument were open to challenge on any question of fact or law, s 4.15(1)(a) did not permit a court to decide whether any environmental planning instrument applied provided

5 See (2022) 255 LGERA 136 at 144 [21].

6 (2022) 255 LGERA 136 at 143 [16], 145 [23]-[24].

7 (2022) 255 LGERA 136 at 140 [1], 165 [102]-[103].

8 (2004) 61 NSWLR 707.

9 (2004) 61 NSWLR 707 at 724 [86]-[88].

10 (2022) 255 LGERA 136 at 158 [77].

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that the development was permissible with consent.¹¹ This conclusion in part reflected his Honour's description of the function of s 4.15(1) in these terms:¹²

"Prohibited development aside, a consent authority is obliged to determine whether or not to grant consent to a development application ... and is required to carry out an evaluation taking into consideration the matters specified in s 4.15."

19 The proviso "[p]rohibited development aside" (also expressed as "provided the development was permissible with consent"), the basis upon which Basten A-JA distinguished *Woolworths Ltd v Pallas Newco Pty Ltd*, was critical to his Honour's reasoning, as disclosed in his conclusion that:¹³

"as a matter of construction of the [EPA Act], the application of the environmental planning instruments, including SEPP 65, *in a particular case where development is permissible with consent*, is a matter for consideration by the consent authority in the first instance (subject to statutory forms of review and appeal) and does not require (or permit) determination by the court".

20 In *El Khouri v Gemaveld Pty Ltd*¹⁴ no application was made to the Court of Appeal to re-open *Ross v Lane*.¹⁵ Therefore, Leeming JA (with whom Gleeson and Adamson JJA agreed) applied *Ross v Lane* to conclude that a maximum height provision in a local environmental plan did not involve a question of jurisdictional fact (but was a relevant consideration under s 4.15(1)(a) of the EPA Act). It followed from this conclusion that compliance with the maximum height provision would have been a matter for the opinion of the consent authority.¹⁶

11 (2022) 255 LGERA 136 at 156-157 [73], 158-160 [79]-[82], 162-165 [93]-[103].

12 (2022) 255 LGERA 136 at 163 [94].

13 (2022) 255 LGERA 136 at 164 [100] (emphasis added).

14 (2023) 256 LGERA 24.

15 (2023) 256 LGERA 24 at 39 [50].

16 Or, in that case, the Commissioner of the Land and Environment Court of New South Wales exercising the function under s 34(3) of the *Land and Environment Court Act 1979* (NSW). See (2023) 256 LGERA 24 at 40 [53], 44 [74].

21 Subsequently, in *Bingman Catchment Landcare Group Inc v Bowdens Silver Pty Ltd* ("*Bingman*"),¹⁷ White JA observed that "the fact that the chapeau to s 4.15(1) refers to the consent authority's consideration of the matters in that subsection provides textual support for Basten AJA's analysis".¹⁸

22 MACH submitted that the effect of the reasoning in *Ross v Lane* was that, properly construed, s 4.15(1) of the EPA Act means "[i]n determining a development application, a consent authority is to take into consideration such of the following matters as are, *in the opinion of the consent authority*, of relevance to the development the subject of the development application". While White JA in *Bingman* may appear to have expressly rejected that proposition,¹⁹ one reading of his Honour's reasons is that he considered that s 4.15(1) of the EPA Act is to be so construed but that such a construction did not involve the impermissible addition of words into that provision. MACH's contention in this appeal assumes this reading of White JA's reasons and calls in aid *Ross v Lane* to undermine the reasoning of the Court of Appeal and DAMSHEG's notice of contention.

The text, context and purpose of s 4.15(1)(a)(i) of the EPA Act

23 The language of s 4.15(1), in requiring the consent authority to consider such of the specified matters "as are of relevance to" the development, does not consign the question of the relevance of those matters as specified to the consent authority's "own classification of the relevant circumstances".²⁰ That is, the terms of s 4.15(1)(a)-(e) impose on the consent authority a duty to consider such of the specified matters as are objectively "of relevance" to the development the subject of the development application.

24 Insofar as s 4.15(1)(a)(i) is concerned, a consent authority cannot consider such of the provisions of an environmental planning instrument that apply to the land to which the development application relates as are of relevance to the development, unless and until the consent authority correctly identifies and construes the provisions of the environmental planning instruments which may so apply. That a consent authority must correctly identify and construe the provisions of environmental planning instruments which may apply (so that the court and not

17 (2024) 260 LGERA 297.

18 (2024) 260 LGERA 297 at 319 [101].

19 (2024) 260 LGERA 297 at 319 [100].

20 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 149 [33].

the consent authority is the final arbiter of that question) is fundamental to the operation of the EPA Act in respect of regulating "development".²¹

25 The EPA Act distinguishes between development that does not need consent, development that needs consent, and development that is prohibited (or cannot be carried out on land with or without development consent). In each case, it is an environmental planning instrument (or a combination of such instruments) that provides whether the development does not need consent, needs consent, or is prohibited (or cannot be carried out on land with or without development consent).²² By s 9.51, contraventions of s 4.2(1) (the carrying out of development that requires development consent) or s 4.3 (development that is prohibited or cannot be carried out on land with or without development consent) are a criminal offence.

26 By s 3.13(1) of the EPA Act, "an environmental planning instrument may be made in accordance with [Pt 3] for the purposes of achieving any of the objects of" the EPA Act. By s 3.14(1)(b), an environmental planning instrument may make provision for or with respect to "controlling (whether by the imposing of development standards^[23] or otherwise) development". By s 3.18(1), "[w]ithout limiting the generality of section 3.14(1)(b), an environmental planning instrument may provide that development specified therein ... (a) may be carried out without the necessity for consent under this Act being obtained therefor, or (b) may not be carried out except with consent under this Act being obtained therefor". By s 3.19, "[w]ithout limiting the generality of section 3.14(1)(b), an environmental planning instrument may provide that development specified therein is prohibited". As environmental planning instruments may overlap with one another, s 3.28 regulates the resolution of inconsistency between such instruments. Such potential inconsistency, to be resolved in accordance with s 3.28(1), can extend to the permissibility or prohibition of a development and the designation of the relevant consent authority for a development.

21 Defined in EPA Act, s 1.5.

22 EPA Act, ss 4.1-4.3.

23 Defined in the EPA Act, s 1.4. See also s 4.15(3)(b). In summary, a provision of an environmental planning instrument "by or under which requirements are specified or standards are fixed in respect of any aspect of" development is a "development standard". For a development application for development that does not comply with a so-called "non-discretionary development standard", a "provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard".

27 In this context, s 4.15(1)(a)(i), in requiring the consent authority to "consider" the provisions of any environmental planning instrument that are of relevance to the development the subject of the development application, recognises that the development may be for a purpose permissible with consent under one provision of an environmental planning instrument but prohibited from being carried out under another provision of the same instrument or a provision of a different instrument, whether by reference to the purpose of the development, by reference to a development standard, or otherwise.

28 The consequence is that, contrary to the reasoning of Basten A-JA in *Ross v Lane*, unless and until the consent authority correctly identifies the environmental planning instruments and the provisions of those instruments applicable to the development, the consent authority cannot decide: (i) if the development the subject of the development application is permissible with consent or prohibited from being carried out; or (ii) if the development is permissible with consent, the relevant consent authority for the development the subject of the development application. The critical provisos on which the reasoning in *Ross v Lane* relies, that the development "is not prohibited" and is "permissible with consent", do not exist apart from the correct identification and construction of the provisions of environmental planning instruments relevant to the development.

29 The reasoning in *El Khouri v Gemaveld Pty Ltd*²⁴ exposes the error underlying *Ross v Lane*. To explain, the relevant provision of the environmental planning instrument in that case stated that the height of a building was not to exceed the maximum height shown on a "Height of Buildings Map". Applying *Ross v Lane* (the correctness of which was not challenged in *El Khouri*), Leeming JA identified the permissibility of the development with development consent as critical to the conclusion that the maximum height provision did not involve a question of jurisdictional fact, giving effect to the reasoning in *Ross v Lane*.²⁵ The problem is that, on the terms of the maximum height provision, the development (a building) was not permissible with development consent if the building in fact exceeded the maximum height limit in the maximum height provision. That is, in its terms, the maximum height provision was a provision of an environmental planning instrument that provided that "specified development is prohibited on land to which the provision applies" for the purpose of s 4.3(a) of

24 (2023) 256 LGERA 24.

25 (2023) 256 LGERA 24 at 43 [72].

the EPA Act, the specified development being a building the height of which exceeded the maximum height shown on the "Height of Buildings Map".²⁶

30 This exposes why part of the essential function of a consent authority, which is anterior or preliminary to the consent authority's evaluation of the merits of the development, is: (i) the correct identification of the permissibility of the development with or without consent or its prohibition, including its prohibition by way of a development standard capable of disapplication under another provision of an environmental planning instrument; and (ii) the correct identification of the consent authority for the development the subject of the development application. Those essential functions depend on the consent authority, first, correctly identifying and construing the environmental planning instruments which apply to the development and, second, resolving any inconsistency between those instruments in accordance with s 3.28 of the EPA Act. Accordingly, a question of fact which a consent authority is required to determine to correctly identify and construe the environmental planning instruments which apply to the development the subject of the development application is a question of jurisdictional fact for a court to decide for itself as necessary, as held in *Woolworths Ltd v Pallas Newco Pty Ltd*.²⁷

31 For these reasons, MACH's submission that the reasoning of Basten A-JA in *Ross v Lane* supports the proposition that even if the Commission had not considered the emission of greenhouse gases from the development, including scope 3 emissions, as a likely impact of the development by contributing to global climate change, that would not constitute a breach of the EPA Act potentially invalidating the development consent, cannot be accepted.

Construing s 4.15(1)(b) of the EPA Act

An error in the Court of Appeal's construction and its consequences

32 The Court of Appeal, in effect, construed s 4.15(1)(b) on the basis that the words after the first comma in the phrase "the likely impacts of that development, including environmental impacts on both the natural and built environments, and

26 That the maximum height provision was a "development standard" that was subject to another provision of the environmental planning instrument (cl 4.6), enabling the consent authority to grant development consent to a development that did not comply with the maximum height provision on being satisfied as to certain matters, did not alter the fact that the maximum height provision had the effect of prohibiting the carrying out of the development under s 4.3(a) of the EPA Act unless and until the other provision was satisfied. See, eg, (2023) 256 LGERA 24 at 43 [67].

27 (2004) 61 NSWLR 707.

social and economic impacts in the locality" operated separately from and were not encompassed by the words before that comma. Properly construed, however, the latter part of the provision is not separate from the former part. The words after the first comma function only to describe or explain aspects of the scope of the words before the comma. The words after the comma no doubt also reflect the practical reality that the likely impacts of many (if not most) developments will be confined to the locality of the development. This practical reality, however, does not change the meaning of s 4.15(1)(b), in which the words before the comma encompass the entirety of the words after the comma.

33 This seemingly obscure point of construction matters because if it is not recognised that the words after the comma are merely descriptive or explanatory of certain kinds of likely impacts which are encompassed by the words before the comma, it can more readily be concluded, incorrectly, that the focus of s 4.15(1)(b) is the likely impacts of the development in the locality rather than the likely impacts of the development. The Court of Appeal construed s 4.15(1)(b) in this way, as requiring a consent authority to consider the "specific impacts [of the development] on the locality", this being, as Ward P put it, "the essential matter with which s 4.15(1)(b) is centrally concerned – the impacts of the proposed development on the locality of the development".²⁸ On this construction, Ward P concluded that the Commission "failed to engage with [this] essential matter", as a "causal enquiry as to the impacts on the locality was required", and thereby the Commission had "failed to consider a mandatory consideration in this regard",²⁹ because "[t]here is nothing in the Commission's reasons to indicate that the Commission, having accepted that Scope 3 emissions would make up 98% of the Project's [greenhouse gas] emissions and that those emissions would contribute to global climate change, went on to consider the impact of climate change on the locality (which was the required causal enquiry)".³⁰

34 To similar effect, Adamson JA said that the "evident legislative intention of the provisions ... is that a planning authority such as the Commission is obliged to take into account the likely environmental impact of the development in the locality" and "the purpose of these provisions is to indicate to those most affected by the development (being those in the locality) that their views and the likely impact on their surrounds have been taken into account by the decision-maker and

28 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 291 [109], see also at 321 [245].

29 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 291 [109], see also at 321 [245].

30 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 291 [108], see also at 321 [245].

to explain why the decision has been made".³¹ On this construction, according to Adamson JA, the Commission's "obligation to consider the likely impacts of the development on the natural and built environment in the locality of the mine, as required by s 4.15(1)(b), required it to address these potentially adverse effects in the locality".³² The Commission's report, however, did not "distinguish between the effects of global warming generally and the effects of climate change in the locality of the project", when "the evidence indicated that [the] impact [of scope 3 emissions] would be disproportionately felt in the locality of the project".³³

35 In treating the likely impacts of the development in the locality as that with which s 4.15(1)(b) is centrally concerned, the Court of Appeal was treating that concept as a "fundamental element" in and "focal point" of the required consideration in the sense discussed in *Zhang v Canterbury City Council*³⁴ (referring to *R v Hunt*; *Ex parte Sean Investments Pty Ltd*³⁵ and *Evans v Marmont*³⁶). However, as explained, s 4.15(1)(b) constitutes as its fundamental element or focal point the likely impacts of the development. Under s 4.15(1)(b), accordingly, if a likely impact of the development is confined to the locality of the development, it is that likely impact in the locality which must be considered. If, however, a likely impact of the development is not confined to the locality of the development, s 4.15(1)(b) does not elevate to a fundamental element in or focal point of the required consideration that likely impact in the locality over and above that likely impact elsewhere.

36 This does not mean that the locality in which the development is located is irrelevant. It may be relevant to the application of s 4.15(1)(b) as explained above. But if a development has a likely impact which is not limited to the locality, nothing in the text of s 4.15(1)(b) elevates the likely impact in the locality above the likely impact elsewhere. In this way, the proper construction of s 4.15(1)(b)

31 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 319 [235], see also at 321 [245].

32 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 320 [236] (emphasis omitted), see also at 321 [245].

33 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 320 [238], see also at 321 [245].

34 (2001) 51 NSWLR 589 at 602-603 [71]-[76].

35 (1979) 180 CLR 322 at 329.

36 (1997) 42 NSWLR 70 at 79-80.

alters the framing of the issue concerning that provision as determined by the Court of Appeal.

37 Three other matters should now be noted.

38 First, on the proper construction of s 4.15(1)(b), in which the words before the first comma encompass the words after that comma, it is an immaterial distraction to ask whether the words "in the locality" qualify only the "social and economic impacts" of the development or both the "environmental impacts on both the natural and built environments" and the "social and economic impacts" of the development. To the extent the arguments in the appeal concerned that issue, they may be put to one side.

39 Second, in requiring the consent authority to take into consideration such of the matters specified in s 4.15(1)(b) "as are of relevance to the development the subject of the development application", the required focus is the development itself and its likely impacts. In all cases, the impact must be "likely", meaning that the impact must have a real, not far-fetched, fanciful or trivial, chance or possibility of occurring as a result of the development.³⁷

40 Third, by reason of these matters, in taking into consideration a "likely impact" which the consent authority has correctly identified as of relevance to the development, the level of specificity at which the consent authority takes that likely impact into consideration is ordinarily a matter for the consent authority.³⁸

The material before the Commission

41 To the extent that DAMSHEG's additional ground in its amended notice of contention depended on the proposition that the mere making of a submission about a development application which raises a particular likely impact of the development means that the consent authority must consider that likely impact at the same level of particularity as the submission in order to discharge its duty under s 4.15(1)(b) of the EPA Act, that additional ground must be rejected.³⁹ Nor is any such obligation imposed on a consent authority by s 4.15(1)(b) merely because the material accompanying a development application refers to a matter that the authors of that material considered to be a "likely impact[]" of [the] development",

37 *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 81 NSWLR 638 at 651 [46].

38 *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 452 [23].

39 *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at 452 [23].

including in an EIS prepared in accordance with the legislative requirements relating to the content of the EIS.⁴⁰

42 This said, in the present case it was common ground in the material before the Commission that the development's contribution to global greenhouse gas emissions and the development's consequential contribution to global climate change impacts constituted likely impacts of the development. To perform its duty under s 4.15(1)(b) the Commission did not have to: (i) allocate its consideration of climate change impacts separately to each of s 4.15(1)(b) ("the likely impacts of [the] development"), s 4.15(1)(d) ("any submissions made"), and s 4.15(1)(e) ("the public interest"); or (ii) advert to each and every climate change impact across the globe as identified in the EIS, submissions or other material before the Commission. For these reasons, DAMSHEG's second ground of contention, referring to the material before the Commission, including the EIS, collapses into the contention upheld by the Court of Appeal that the Commission breached s 4.15(1)(b) of the EPA Act.

Did the Commission breach s 4.15(1)(b) of the EPA Act?

43 DAMSHEG's contention before the Commission and its claim in the proceedings in respect of s 4.15(1)(b) related solely to the likely impact of the development's scope 3 emissions and the contribution of those emissions to climate change. As noted, the Court of Appeal inferred that the Commission had breached s 4.15(1)(b) because the Commission had not considered the specific impacts of the development in terms of its contribution to the cumulative effects of climate change in the locality, but had confined its consideration to the development's contribution by its greenhouse gas emissions (including scope 3 emissions) to the global impacts of climate change. The specific impacts which the Court of Appeal concluded that the Commission had to consider involved a likely rise in average temperatures in the Hunter region so that bushfires may become more prevalent in that area and that rainfall has the potential to both increase and decrease, particularly seasonally, with heavier rainfall events likely to become more frequent. This conclusion, however, followed from the erroneous construction of s 4.15(1)(b) as discussed above.

44 To explain, in its reasons for decision the Commission expressly stated that: (i) it had "carefully considered", amongst other things, the EIS and "all public submissions on the EIS made to the [Department of Planning and Environment] during public exhibition"; (ii) the "key issues" that emerged from the submissions included greenhouse gas emissions and the cumulative impact of greenhouse gas emissions on climate change, the impact of which (including scope 3 emissions)

40 eg, *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 2, cl 3(1), 6, 7.

"is ... felt globally"; (iii) the Commission had "considered all emissions associated with the Project (including Scope 3 emissions) in its assessment and determination"; (iv) the EIS had been accompanied by a "Greenhouse Gas Assessment", which included a "Greenhouse Gas Calculations Report, dated 11 January 2021"; (v) 98% of the greenhouse gas emissions associated with the development are scope 3 emissions; (vi) the development's scope 3 emissions "would contribute to anthropogenic climate change"; and (vii) while those scope 3 emissions did not form part of the accounting of the development's greenhouse gas emissions under the United Nations Framework Convention on Climate Change Paris Agreement (2015) ("the Paris Agreement"), as they would be accounted for in the country in which combustion of the coal occurred, "the cumulative impact of [greenhouse gas] emissions is still felt globally".

45 In this context, it cannot be said that the Commission did not consider "the likely impacts of [the] development" as s 4.15(1)(b) required. A likely impact of the development was its contribution to global greenhouse gas emissions including scope 3 emissions and associated global anthropogenic climate change impacts, which would be experienced globally.

46 The Commission recognised that the Paris Agreement, to which Australia is a party,⁴¹ provided for the development's scope 3 emissions to be included as part of the emissions of the countries in which the coal was to be combusted. In saying, in effect, that despite this, the impacts of climate change are global and would be felt globally, the Commission was recognising that, irrespective of the internationally agreed accounting treatment for scope 3 emissions, such emissions were a likely impact of the development required to be considered. While the Court of Appeal concluded that the Commission's recognition of the global impact of climate change was insufficient to discharge the duty of the Commission as the consent authority under s 4.15(1)(b), that conclusion assumed that the development's contribution to climate change in the locality in the form of an average rise in temperature and the increased risk of bushfires and heavy rainfall in the Hunter region (as the locality of the development) was required to be the fundamental element in or focal point of the Commission's consideration.

47 Given that the development would contribute to global greenhouse gas emissions and thereby contribute to the global effects of climate change, the Commission's consideration of the impacts of climate change globally necessarily encompassed the required consideration of the impacts of climate change locally. If the Commission had concluded, based on the material before it or otherwise, that the local impacts of climate change to which the development would contribute would be of a materially different magnitude, nature, extent or

41 Australia signed the Paris Agreement on 22 April 2016.

immediacy from climate change's impacts globally, the position might have been different. It must be inferred, however, that the Commission did not so conclude.

48 Adamson JA, as noted, referred to climate change impacts being "disproportionately felt in the locality of the project".⁴² Her Honour explained this perceived "disproportionate" impact in the locality in these terms:⁴³

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

49 The material before the Commission, however, identified that the impacts of climate change are global and would be experienced in every location across the planet in one form or another, including in the locality of the development. That material included, for example, a report of Professor Penny Sackett which was lodged on behalf of DAMSHEG. This report identified that climate change was having irreversible effects on the earth's systems as a whole. Specific climate change impacts Professor Sackett identified across the globe included soaring temperatures in Death Valley in the United States of America, record fires in South America, the highest temperature yet recorded in Antarctica, heatwaves in Canada, the strongest recorded landfall cyclone in Somalia, record wildfires in California, the strongest recorded super typhoon in the Philippines, heatwaves and thawing permafrost in Siberia and likely the highest temperature yet recorded in the Arctic, extreme rainfall in China, a megadrought in North America, involving the driest period in the southwestern region for more than 1,200 years, and simultaneous heatwaves in 2022 at both poles. Professor Sackett also identified that Australia as a whole is experiencing serious climate related impacts, including substantially increased temperatures, extreme fire events, heavier rainfall and unprecedented flooding, ocean warming, ocean acidity, flash droughts, and extreme weather disasters. Professor Sackett said that New South Wales had experienced most of the phenomena described in respect of Australia. In respect of the Hunter region, in which the development is located, Professor Sackett said that harsher fire

42 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 320 [238].

43 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 320 [237].

weather, increased intensity of extreme rainfall events and extreme sea level events could be expected.

50 On the proper construction of s 4.15(1)(b), the question of fact whether the development's contribution to the likely global impact of climate change would be "disproportionately felt in the locality of the project" was not a matter for a court to decide. That question of fact was not, in and of itself, a mandatory relevant consideration by reason of s 4.15(1)(b). And if it had been a mandatory relevant consideration under s 4.15(1)(a)-(e), the answer to that question would have been for the Commission to decide for itself (reasonably and rationally having regard to the material before it).

51 The proper construction of s 4.15(1)(b) also determines that the true question of fact for decision by a court – did the Commission consider the likely impacts of the development in the form of climate change impacts including in the locality of the development – must be answered in the affirmative. On the Court of Appeal's construction, in which the locality was held to be central or essential to s 4.15(1)(b), the Court of Appeal inferred that the Commission had not considered those likely local impacts as the Commission did not expressly refer to them. However, on the proper construction of s 4.15(1)(b), no such inference is open. Nor did the fact that some material before the Commission said that New South Wales and the Hunter region were particularly vulnerable to the impacts of increased bushfire risks and heavy rainfall events resulting from climate change compared to other parts of Australia mean that the Commission was required by s 4.15(1)(b) to refer to those specific impacts in its reasons for decision.

52 There are several reasons why no inference can be drawn that the Commission did not consider the specific impacts of climate change in the locality to which the development would contribute by reason of its greenhouse gas emissions (including scope 3 emissions).

53 First, and as noted, the Commission said that it had "carefully considered" the EIS and the public submissions which dealt with those specific impacts in the locality, amongst the global impacts, of climate change.

54 Second, in respect of the EIS, the Commission's reasons expressly refer to the accompanying "Greenhouse Gas Assessment", which included a "Greenhouse Gas Calculations Report, dated 11 January 2021". The "Greenhouse Gas Assessment" is Appendix S to the EIS. That document contains the very material about the local impacts of climate change (specifically, increased bushfire risk and heavier rainfall events in the Hunter region) that DAMSHEG contends that the Commission failed to consider.

55 Third, the mitigating measures suggested in Appendix S to the EIS to deal with those specific local climate change risks were: (i) compliance with a proposed

bushfire management plan; (ii) compliance with proposed water management and storage measures; and (iii) MACH implementing "an adaptive management approach" to climate change risks on an ongoing basis. The development consent that the Commission granted for the development includes conditions specifically requiring preparation and implementation of a bushfire management plan and adoption of water management and storage measures (conditions B52-B54, B84-B86). DAMSHEG submitted that these conditions were not imposed in response to specific local climate change risks, but there can be no question that Appendix S to the EIS recommended these measures partly in response to specific local climate change risks and the Commission imposed such conditions. Moreover, the surface and groundwater management conditions include response criteria in respect of all such water bodies "potentially impacted by the development" and the bushfire management conditions include assisting the Rural Fire Service and emergency services "to the extent practicable if there is a fire in the vicinity of the site". That is, these conditions are specifically addressed to managing climate change impacts in the locality.

56 Fourth, one of the grounds of DAMSHEG's application for judicial review to the Land and Environment Court was that the Commission failed to consider DAMSHEG's submissions and accompanying expert reports in respect of the development's scope 3 emissions, including the report of Professor Sackett, amongst others, in alleged breach of s 4.15(1)(d) of the EPA Act. As noted, Professor Sackett's report included a detailed review of the global, national, New South Wales, and regional effects of climate change. The primary judge rejected this ground of review. DAMSHEG did not challenge the primary judge's rejection of that ground of review. DAMSHEG cannot now run the same challenge under a different guise, which it is attempting to do in its additional ground of contention.

57 For these reasons, MACH's first ground of appeal must be allowed and DAMSHEG's additional ground of contention must be rejected.

Consequences for MACH's other appeal grounds

58 Given these conclusions, MACH's second ground of appeal, alleging that the Court of Appeal erred by incorrectly construing s 4.15(1)(b) of the EPA Act as if it imposed a requirement to conduct a causal inquiry as to the impacts of climate change, does not arise. MACH's third ground of appeal, that the Court of Appeal erred by concluding that the impact of climate change is capable of being an environmental impact in the locality of the development within the meaning of s 4.15(1)(b) of the EPA Act, also does not arise.

Did the Commission contravene s 2.20 of the Resources SEPP and therefore s 4.15(1)(a)(i) of the EPA Act?

Context of DAMSHEG's contention

59 Putting aside MACH's reference to *Ross v Lane*, there was no dispute that, by reason of s 4.15(1)(a)(i) of the EPA Act, in granting the development consent the Commission was required to take into consideration the Resources SEPP. That is, the Commission was required to correctly identify the provisions of that instrument which applied to the development, properly construe those provisions, and apply those provisions in accordance with their terms as so properly construed.

60 The provision on which DAMSHEG relied was s 2.20. Section 2.20 provided that:

- "(1) Before granting consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the following –
 - (a) that impacts on significant water resources, including surface and groundwater resources, are avoided, or are minimised to the greatest extent practicable,
 - (b) that impacts on threatened species and biodiversity, are avoided, or are minimised to the greatest extent practicable,
 - (c) that greenhouse gas emissions are minimised to the greatest extent practicable.
- (2) Without limiting subsection (1), in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions."

61 According to DAMSHEG, the Commission did not consider whether development consent should be granted subject to conditions aimed at ensuring that scope 3 greenhouse gas emissions of the development are minimised to the greatest extent practicable, with the consequence that the decision to grant the development consent was in breach of s 4.15(1)(a) of the EPA Act and thereby invalid. DAMSHEG relied on several circumstances to support this contention,

namely: (i) in its reasons the Commission did not state that it had considered if conditions could or should be imposed to minimise scope 3 emissions of the development to the greatest extent practicable; and (ii) it was not for DAMSHEG to propose such conditions and it did not do so – rather it was for MACH to identify such conditions as the applicant for development consent, as reinforced by cll 6 and 7 of Sch 2 to the *Environmental Planning and Assessment Regulation 2000* (NSW) ("the EPA Regulations"). Amongst other things, cl 7(1)(d)(iv) required the EIS to provide "a full description of the measures proposed to mitigate any adverse effects of the development ... on the environment" and the Planning Secretary's "environmental assessment requirements" with respect to the EIS under cl 3(5) of Sch 2 to the EPA Regulations effectively repeated this requirement. DAMSHEG further contended that: (iii) despite it being MACH's responsibility as the applicant for the development consent to propose conditions to minimise greenhouse gas emissions, including scope 3 emissions, MACH did not do so; (iv) given that the Commission's reasons deal in detail with conditions to minimise scope 1 and 2 emissions, it would be expected that the Commission's reasons would explain its decision not to impose any conditions minimising scope 3 emissions, but the Commission's reasons contain no such explanation and the development consent imposes no such condition; and (v) the Commission relied on the Paris Agreement and other policies to disregard the requirement in s 2.20(1)(c) of the Resources SEPP to consider imposing conditions to minimise scope 3 greenhouse gas emissions to the greatest extent practicable.

62 Three matters should be noted about the construction of s 2.20(1)(c).

63 First, in referring to greenhouse gas emissions, s 2.20(1)(c) undoubtedly means all greenhouse gas emissions, including scope 3 emissions. That s 2.20(2) expressly states "greenhouse gas emissions (including downstream emissions)" whereas s 2.20(1)(c) does not would be an unsound basis to construe the latter provision as if the reference in it to "greenhouse gas emissions" excludes "downstream" (meaning scope 3) emissions.

64 Second, unlike s 4.15(1)(b) of the EPA Act (in which the specified matters to be considered are those matters "as are of relevance to" the development the subject of the development application), s 2.20(1)(c) of the Resources SEPP requires the consent authority, in every case to which the provision applies, to "consider whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the" matters set out in paras (a)-(c).

65 Third, unlike s 4.15(1)(b) of the EPA Act (in which the words "the likely impacts of [the] development" are inclusive of the specific impacts said thereafter to be included), s 2.20(1) of the Resources SEPP, in referring to "conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the following", requires the consent

authority, in every case, to consider the imposition of conditions to ensure each matter as specified in paras (a)-(c). That is, the imposition of conditions to ensure each such matter requires specific consideration. While this duty may be satisfied by considering such conditions to be unnecessary or immaterial to the development, the duty must still be performed.

Commission did not breach s 2.20(1)(c) of the Resources SEPP

66 It cannot be inferred that the Commission failed to comply with s 2.20(1)(c) of the Resources SEPP.

67 In its reasons, after stating that "[i]n the NSW policy context, [s] 2.20(1) of the Resources SEPP expressly requires the consent authority to consider", the Commission quoted the whole of that provision. The Commission then said that s 2.20(2) of the Resources SEPP "also requires the consent authority to consider" and thereafter quoted the whole of that provision. Subsequently in its reasons, the Commission said (emphasis added):

"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 [greenhouse gas] 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 of Planning and Environment] 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 [greenhouse gas] 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 [greenhouse gas] 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 [greenhouse gas] emissions and to track their progress in doing so.*
154. The Commission has considered the matters in [ss] 2.20(1) and 2.20(2) of the Resources SEPP (in addition to the mandatory considerations under section 4.15 of the [EPA 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 [New South Wales Climate Change Policy Framework], the [New South Wales Net Zero Plan Stage 1: 2020-2030] or Australia's current obligations under the Paris Agreement in respect of Australia's current [Nationally Determined Contributions].
155. The Commission notes there is a growing body of international, national and State policy that is aimed at reducing [greenhouse gas] emissions (see paragraphs 126 - 138 above), particularly those associated with fugitive methane. The Commission is required to have regard to such applicable polic[i]es at the national and State level (under section 2.20 of the Resource[s] 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 [greenhouse gas] emissions from developments such as the Project.

...

161. For the reasons set out above, the Commission finds that the [greenhouse gas] 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 [EPA 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."

68 Paragraphs 126-138 of the Commission's reasons, as referred to in this extract, contain a detailed review of the international, national and State regulation of greenhouse gas emissions and their common objectives, being each relevant country or State reducing greenhouse gas emissions by, amongst other things, investing in new technologies, and achieving the target of net zero greenhouse gas emissions by 2050, with Australia specifically aiming to achieve a 43% reduction in greenhouse gas emissions by 2030.

69 Contrary to the submissions for DAMSHEG, the Commission's purpose in referring to the objects and operation of these international, national and State agreements and policies in respect of the overall reduction of greenhouse gas emissions was not to enable the Commission to put scope 3 emissions to one side so that the Commission could avoid complying with s 2.20(1)(c) of the Resources SEPP. Rather, the Commission was discharging its function under s 2.20 as a whole. Under s 2.20(2) the Commission, in determining the development application, had to "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". Given the content of those State and national agreements and policies, it was appropriate for the Commission to explain their operation in the context of Australia's international commitments. The Commission's point was not that the operation of these agreements and policies made s 2.20(1)(c) irrelevant. The proper inference is that the Commission's point was that, in the context of these agreements and policies, which focus on global co-operation to achieve reductions in global greenhouse gas emissions, it was satisfied that the imposition of conditions regulating scope 1 and 2 greenhouse gas emissions appropriately discharged its function of considering conditions to ensure that all greenhouse gas emissions (including scope 3 emissions) of the development are minimised to the greatest extent practicable. By this means, the Commission also considered "whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner".

70 That this is the proper inference is confirmed by the Commission's repeated references in the extract above from its reasons to s 2.20 of the Resources SEPP and its propositions that: (i) "[t]he Commission has considered the matters in

[ss] 2.20(1) and 2.20(2) of the Resources SEPP"; (ii) "[i]nstead of prescribing the refusal of development for projects such as the Project under consideration"; and (iii) "[s]ubject to the imposed conditions, the Commission is satisfied that the Project can achieve the requirements of the Resources SEPP". That is, in the context of the applicable international, national and State agreements and policies, the Commission considered that the conditions it was imposing with respect to scope 1 and 2 greenhouse gas emissions ensured that all greenhouse gas emissions of the development (including scope 3 emissions) would be minimised to the greatest extent practicable. Within this conceptual framework, the Commission's detailed consideration of the applicable international, national and State agreements and policies and of the imposition of conditions to minimise scope 1 and 2 emissions is not conveying a failure to consider the minimisation of scope 3 emissions. The Commission's entire consideration of greenhouse gas emissions of the development was directed to the Commission complying with its duty to consider imposing conditions to ensure that all greenhouse gas emissions of the development are minimised.

71 For these reasons, this ground of DAMSHEG's notice of contention must also be rejected.

Conclusion and orders

72 The Court of Appeal misconstrued and therefore misapplied s 4.15(1)(b) of the EPA Act. The Court of Appeal's orders allowing the appeal, accordingly, involved error. The orders that are to be made are:

- (1) The appeal is allowed.
- (2) The orders of the Court of Appeal made on 24 July 2025 be set aside and in lieu thereof it be ordered that the appeal to that Court be dismissed with costs.
- (3) The first respondent is to pay the costs of the appellant in respect of the appeal to this Court.

73 GORDON J. The Mount Pleasant coal mine is an open cut coal mine in the Hunter Valley, New South Wales ("NSW"). The appellant, MACH Energy Australia Pty Ltd ("MACH"), is the owner of the mine. Following public hearings, the second respondent, the Independent Planning Commission of NSW ("the Commission"), approved MACH's application to extend the life of the mine by 22 years and significantly expand its operations.

74 The first respondent, Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc ("DAMSHEG"), applied for judicial review of that decision. The Land and Environment Court of NSW dismissed that application, but its decision was overturned by the Court of Appeal of the Supreme Court of New South Wales ("the NSWCA").

75 The appeal raises three issues.

76 The *first issue* is whether the Commission failed to take into consideration the "likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality", as required by s 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act").⁴⁴ That is a question of statutory construction. As will be explained, the NSWCA misconstrued s 4.15(1)(b) as requiring the Commission to consider the likely impacts of the development in the locality, when s 4.15(1)(b) requires consideration of the "likely impacts of [the] development". While those impacts may, and often will, include impacts in the locality in question, their identification is a matter for the Commission, as the consent authority.⁴⁵

77 The *second issue* is whether the NSWCA was correct to hold that the Commission took into consideration cl 2.20(1)(c) of the *State Environmental Planning Policy (Resources and Energy) 2021* (NSW) ("the Resources SEPP"), as required by s 4.15(1)(a)(i) of the EPA Act.⁴⁶ Clause 2.20(1)(c) required the Commission to consider "whether or not the consent should be issued subject to conditions aimed at ensuring ... *that greenhouse gas emissions are minimised to the greatest extent practicable*" (emphasis added). Again, it is a question of construction of the applicable legislative framework. As will be explained, the Commission was required to consider imposing conditions to minimise to

44 Grounds 1 and 2 of MACH's appeal and Ground 2 of DAMSHEG's amended notice of contention.

45 See EPA Act, s 4.5(a); *State Environmental Planning Policy (Planning Systems) 2021* (NSW), cl 2.7. The Commission was the consent authority as more than 50 unique public submissions had been made by way of objection.

46 Ground 1 of DAMSHEG's amended notice of contention.

the greatest extent practicable all greenhouse gas emissions, being those emissions identified in MACH's environmental impact statement ("EIS").⁴⁷ The Commission did not. Specifically, it failed to consider whether to impose conditions to minimise to the greatest extent practicable Scope 3 greenhouse gas emissions, which constituted 98 per cent of the project's total greenhouse gas emissions. There is no basis upon which it may be inferred that the Commission considered that issue. DAMSHEG discharged the onus of establishing that the Commission failed to do so. That error was "material" in the sense that there was a realistic possibility that the decision that was in fact made *could* have been different if the error had not occurred.

78 The Commission's approval was invalid. It will be necessary for the matter to be remitted to the Land and Environment Court of NSW to consider making orders under Div 3 of Pt 3 of the *Land and Environment Court Act 1979* (NSW) ("the LEC Act"). The Land and Environment Court of NSW must consider making an order under Div 3 of Pt 3 instead of declaring or determining that the development consent is invalid, in whole or in part.⁴⁸ That Court may relevantly make orders "suspending the operation of the consent in whole or in part" and "specifying terms compliance with which will validate the consent (whether without alterations or on being regranted with alterations)".⁴⁹

79 Given the views formed on the second issue, this Court cannot and should not address the *third issue* raised by Ground 3 of MACH's appeal to this Court, namely whether the impact of climate change is capable of being an environmental impact in the locality of the development within the meaning of s 4.15(1)(b) of the EPA Act. The existence of climate change (and its negative impact on the environment) did not need to be resolved by the Commission. As the primary judge identified, "[i]t is clear that much of the material before [the Commission] 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".

80 What this case decides, and does not decide, has been set out above. This Court is not undertaking any form of merits review. The Court cannot and does not address what follows from the requirement for the Commission to consider whether to impose conditions to minimise to the greatest extent

47 Resources SEPP, cl 2.20(2) read with cl 2.20(1)(c).

48 LEC Act, s 25E. See also LEC Act, s 4(1) definition of "Court", s 25A(1)(b).

49 LEC Act, s 25B(1)(b) read with s 25B(2). The Minister or consent authority may apply to the Court for an order declaring the development consent to be valid or revoking the suspension once the terms specified under s 25B have been substantially complied with: LEC Act, s 25C.

practicable greenhouse gas emissions of the development, including Scope 3 emissions, and what conditions, if any, might be imposed. The statutory requirement was for the Commission to do that and it did not.

Legislative framework

81 The critical provision for the purposes of this appeal is s 4.15(1) of the EPA Act, which relevantly provides:

"Matters for consideration – general In determining a development application, a consent authority *is to take into consideration* such of the following matters as are of relevance to the development the subject of the development application –

- (a) the provisions of –
 - (i) any environmental planning instrument, ...
 that apply to the land to which the development application relates,
- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
- (c) the suitability of the site for the development,
- (d) any submissions made in accordance with this Act or the regulations,
- (e) the public interest." (emphasis added)

The matters listed in s 4.15(1) are matters that the consent authority, here the Commission, "is to take into consideration", provided that they are "of relevance" to the particular development that is the subject of a development application.⁵⁰ Put simply, the consent authority *must* take the listed matters into consideration, provided they are "of relevance".⁵¹

82 Not all of the matters listed in s 4.15(1) will be "of relevance" to every development. There may, for example, be no submissions.⁵² The Commission must therefore, as a preliminary step, determine which of the matters listed in s 4.15(1) are "of relevance" to the development being considered. The Commission's

50 *Ross v Lane* (2022) 255 LGERA 136 at 163 [94].

51 *Ross v Lane* (2022) 255 LGERA 136 at 163 [94].

52 See EPA Act, s 4.15(1)(d).

assessment at this preliminary stage is a jurisdictional fact or essential pre-condition qualifying the power of the Commission. In this case, all parties accepted that the Commission was correct to conclude that the Resources SEPP and the "likely impacts of [the] development" were "of relevance" within s 4.15(1)(a)(i) and (b) respectively.

83 That obligation to "take into consideration" the matters listed in s 4.15(1) is properly construed as an obligation to take those matters "into account and to give weight to them as a fundamental element" in making the determination.⁵³ Given that there is no statutory indication of the weight to be given to the various matters, it is for the decision-maker and not the court to determine the appropriate weight to be given to the relevant matters,⁵⁴ although that determination will be subject to an implied requirement of reasonableness.⁵⁵ As Beech-Jones JA said in relation to the construction of s 4.15(1)(a) of the EPA Act in *Ross v Lane*:⁵⁶

"Section 4.15(1)(a)(i) only requires that the consent authority 'take into consideration' the provisions of the relevant environmental planning instrument. A statutory requirement to 'take into account' a factor in making an administrative decision means it must be 'give[n] weight ... as a fundamental element in making' the relevant determination (*R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 per Mason J). A statutory requirement to take an instrument 'into consideration' is not relevantly different. However, neither phrase requires the decision-maker to apply the instrument as though it were a binding statute."

84 Section 4.15(1)(a)(i) of the EPA Act requires a consent authority to "take into consideration" the provisions of "any environmental planning instrument". The Resources SEPP is an "environmental planning instrument ... that [applies] to the land to which the development application relates" for the purposes of the EPA Act.⁵⁷

53 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329.

54 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

55 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 350 [26].

56 (2022) 255 LGERA 136 at 149 [37].

57 EPA Act, s 1.4(1) definitions of "environmental planning instrument" and "State environmental planning policy". See also s 3.13(2)(a).

85

Clause 2.20 of the Resources SEPP provides:

- "(1) Before granting consent for development for the purposes of mining, petroleum production or extractive industry, *the consent authority must consider whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including conditions to ensure the following –*
- (a) that impacts on significant water resources, including surface and groundwater resources, are avoided, or are minimised to the greatest extent practicable,
 - (b) that impacts on threatened species and biodiversity, are avoided, or are minimised to the greatest extent practicable,
 - (c) *that greenhouse gas emissions are minimised to the greatest extent practicable.*
- (2) Without limiting [cl 2.20(1)], in determining a development application for development for the purposes of mining, petroleum production or extractive industry, *the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.*" (emphasis added)

As will be explained, the "assessment of the greenhouse gas emissions (including downstream emissions) of the development" is in MACH's EIS and, in particular, in the Greenhouse Gas Assessment ("the GHG Assessment") attached to the EIS as Appendix S and which was summarised in Sections 7.21 and 8 of the EIS.

86

The next section of this judgment addresses the facts, including the contents of the EIS, the assessment report of the Department of Planning and Environment ("the Department") and the Commission's consent and statement of reasons. Given the issues raised it is necessary to set out each of those documents in some detail. Each of the three issues is then addressed in turn.

Facts

Mount Pleasant coal mine

87

Development consent for the mine was first granted on 22 December 1999 and has since been the subject of five modifications, with the most recent

modification granted on 29 June 2022. The existing consent authorises the extraction of up to 10.5 million tonnes ("Mt") per annum of run-of-mine coal, until 22 December 2026. MACH purchased the mine in 2016 and commenced mining in 2018.

Project, the EIS and the GHG Assessment

88 On 19 January 2021, MACH lodged a "State significant development" application⁵⁸ for the Mount Pleasant Optimisation Project ("the Project"). The application sought to: (1) extend the life of the mine by 22 years to 22 December 2048; and (2) deepen part of the open cut mining area, allowing for an increase in the mine's peak annual production rate from 10.5 to 21 Mt per annum of run-of-mine coal.

89 On 22 January 2021, MACH lodged an EIS with the Department. For the purposes of this appeal, the critical section of the EIS is Section 7.21 (headed "Greenhouse Gas Emissions"), which is part of the "Environmental Assessment" in Section 7. Section 7.21 summarised, and was to be read with, the GHG Assessment, which provided an "assessment of the potential greenhouse gas emissions and climate change impacts of the Project, and potential impacts of climate change on the Project".⁵⁹ The conclusions in Section 7.21 were further summarised in Section 8 of the EIS (headed "Evaluation and Conclusion"). It is necessary to set out the relevant provisions of the EIS in some detail.

Section 7.21 of the EIS – Greenhouse Gas Emissions

90 Section 7.21 was divided into six sub-sections, which: described the relevant greenhouse gas policies (Section 7.21.1); described the concept of greenhouse gas emission "scopes" (Section 7.21.2); provided a quantitative assessment of potential direct and indirect greenhouse gas emissions of the Project (Section 7.21.3); summarised potential mitigation and abatement measures (Section 7.21.4); summarised the potential impacts of climate change on the Project (Section 7.21.5); and summarised adaptive management measures (Section 7.21.6).

91 Section 7.21.1 (headed "Relevant Greenhouse Gas Policies") addressed the issue under three headings: "Global", "National" and "New South Wales". At the global level, the EIS summarised international agreements that regulate greenhouse gas emissions, including the Kyoto Protocol to the United Nations Framework Convention on Climate Change ("the UNFCCC")

58 See EPA Act, s 4.36.

59 The GHG Assessment itself attached a "Greenhouse Gas Calculations Report".

and the Paris Agreement to the UNFCCC.⁶⁰ Relevantly, parties to the Paris Agreement committed to pursuing efforts to limit global warming by reducing their greenhouse gas emissions. These commitments are known as Nationally Determined Contributions ("NDCs"). At the national level, the EIS recorded that Australia was a party to both the Kyoto Protocol and the Paris Agreement, as well as national legislation and policies that give effect to these agreements, including the *National Greenhouse and Energy Reporting Act 2007* (Cth) ("the NGER Act"), which regulates reporting on greenhouse gas emissions. The EIS recorded that the NGER Act establishes a "Safeguard Mechanism", which sets a baseline level of emissions for certain facilities.⁶¹ For the Mount Pleasant Operation, the baseline emissions value was approximately 0.664 Mt of carbon dioxide equivalent ("CO₂-e"). At the State level, the EIS set out NSW Government policies committing to an "aspirational long-term objective" of achieving net-zero emissions by 2050.

92 Section 7.21.2 was headed "Greenhouse Gas Emission Scopes". The EIS adopted the Greenhouse Gas Protocol ("the GHG Protocol").⁶² The GHG Protocol provides standards and guidance for companies and other organisations preparing greenhouse gas emission inventories. It defines three "scopes" of emissions (Scopes 1, 2 and 3) for greenhouse gas accounting and reporting purposes, including in the international context.

93 The EIS defined Scope 1 emissions as "[d]irect greenhouse gas emissions ... that occur from sources that are owned or controlled by the entity" and are released to the atmosphere principally as the result of an activity, or series of activities, undertaken by the entity at a facility level, such as physical or chemical processing or transportation of materials. The EIS defined Scope 2 emissions as "a category of indirect emissions ... associated with the generation of purchased electricity consumed by the entity".

60 United Nations Framework Convention on Climate Change Kyoto Protocol (1998); United Nations Framework Convention on Climate Change Paris Agreement (2015).

61 If a facility exceeds its baseline level, it is generally required to surrender Australian carbon credit units, equivalent to the exceedance, to the Clean Energy Regulator.

62 The GHG Protocol was developed by the World Business Council for Sustainable Development and World Resources Institute. See also Australia, Department of Industry, Science, Energy and Resources, *National Greenhouse Accounts Factors: Australian National Greenhouse Accounts* (2020), which also applies the concept of Scope 1, 2 and 3 emissions. In the EIS, the GHG Protocol was adopted in Section 7.21.2 and in the GHG Assessment.

94 The EIS defined Scope 3 emissions as "those emissions that are the consequence of the activities of an entity, but which arise from sources not owned or controlled by that entity". The EIS stated:

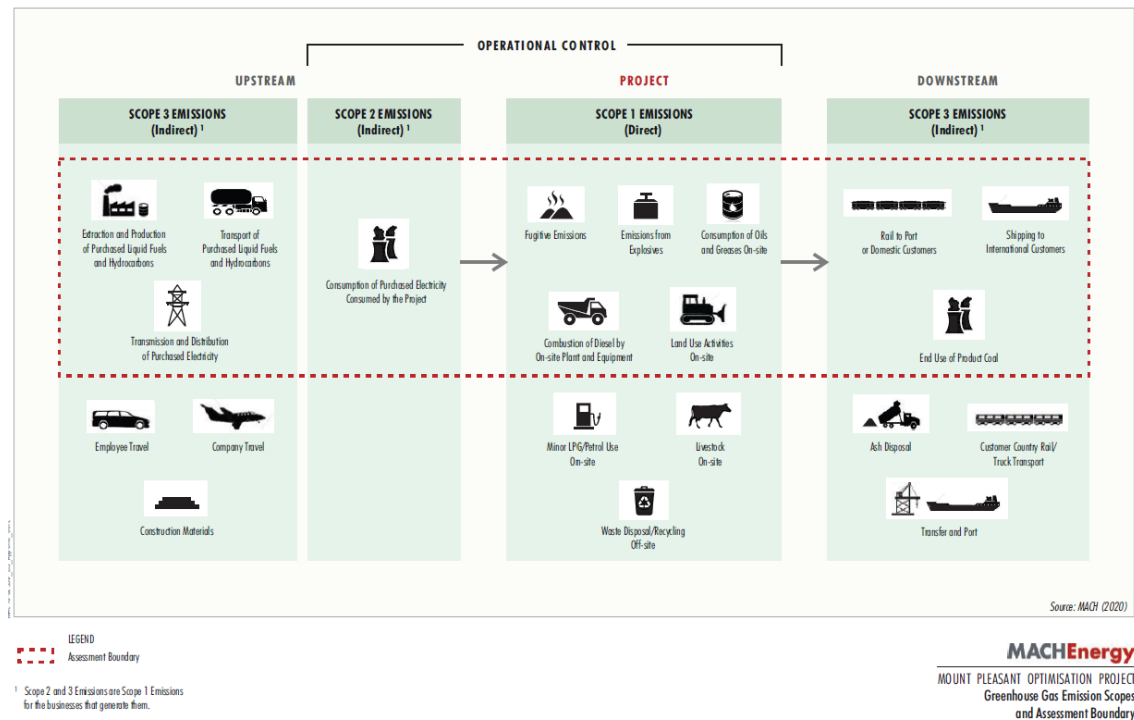
"The GHG Protocol notes that reporting Scope 3 emissions can result in double counting of emissions. For example, greenhouse gas emissions from the burning of coal to produce energy are the Scope 3 emissions of the mines approved to produce the coal, as well as the Scope 1 emissions of the businesses that burn the coal to generate electricity. Those emissions will also be the Scope 2 emissions of the businesses that purchase the electricity."

95 Section 7.21.3, headed "Quantitative Assessment of Potential Greenhouse Gas Emissions", set out the key potential Project greenhouse gas emission sources and their respective scopes. The list appeared to derive from a table in the GHG Assessment and described each source as a Scope 1, 2 or 3 emission. The list included, for example, for Scope 1 emissions, direct emissions from the use of explosives or the combustion of diesel, and fugitive⁶³ emissions from the extraction of coal. Scope 2 emissions included the consumption of purchased electricity used at the Project. Scope 3 emissions included:

- "• upstream emissions from the extraction, production and transport of fuel burned for the generation of electricity consumed, and the electricity lost in delivery in the transmission and distribution network (Scope 3);
- upstream emissions attributable to the extraction, production and transport of diesel consumed at the Project (Scope 3);
- upstream emissions attributable to the extraction, production and transport of oil and grease consumed at the Project (Scope 3);
- downstream emissions from the combustion of diesel used during domestic rail transport and shipping (Scope 3) ...; and
- downstream third-party emissions from the combustion of product coal from the Project (Scope 3)."

63 Fugitive emissions are the emissions that escape when coal is extracted from the ground.

96 The different sources of Scope 1, 2 and 3 emissions were reflected in the following diagram in the GHG Assessment:



As is self-evident, the key potential Project greenhouse gas emission sources included Scope 3 emissions that comprised both upstream and downstream emissions. Those which were within the "assessment boundary" for the Project were specifically identified and included in the table and in the list in the EIS.⁶⁴

97 The EIS then set out the estimated total of each of Scope 1, 2 and 3 emissions over the life of the Project, and the estimated greenhouse gas emissions intensity for Scope 1 and 2 emissions. In addressing greenhouse gas emission intensity, the EIS did not address Scope 3 emissions.

98 Under the sub-heading "Potential Impacts of Greenhouse Gas Emissions on the Environment", the EIS considered the extent of Scope 1 and 2 emissions and their consistency with the Safeguard Mechanism baseline emissions established under the NGER Act, explaining:

"The estimated annual average and maximum annual Scope 1 greenhouse gas emissions of the Project are within the Mount Pleasant Operation's current Safeguard Mechanism baseline emissions value of approximately 0.664 Mt CO₂-e.

⁶⁴ See [95] above.

...

Notwithstanding, it is anticipated that MACH's implementation of various mitigation measures to minimise the overall generation of greenhouse gas emissions from the Project ... would result in greenhouse gas emissions being maintained within any varied Safeguard Mechanism baseline emissions value. ...

The Project's Scope 1 and Scope 2 emissions have together been estimated at approximately 0.54 Mt CO₂-e per year during operations. This is a relatively small contribution to Australian emissions, representing approximately 0.4% of the estimated total greenhouse gas emissions in NSW from 2017 (131.5 Mt CO₂-e) and approximately 0.1% of Australia's annual greenhouse gas emissions from 2017 (534.7 Mt CO₂-e) ...

The Project greenhouse gas emissions would make some contribution to global greenhouse gas emissions. The Project's contribution to climate change, including the associated environmental impacts, would be in proportion with its contribution to global greenhouse gas emissions."

99

The EIS then considered the extent of Scope 3 emissions, stressing that "a significant majority" of Scope 3 emissions would occur overseas and would therefore not be counted towards Australia's emissions for the purpose of the Paris Agreement:

"The Project's Scope 1 and 2 emissions would be significantly less than the Scope 3 emissions produced by customers using Project product coal. *The estimated Scope 3 emissions would represent approximately 0.065% of the total anthropogenic greenhouse gas emissions globally (excluding land use change) in 2017 ... It is anticipated that a significant majority of the Scope 3 emissions from the use of Project coal would occur overseas.*

Under the *Paris Agreement*, each Party is required to prepare, communicate and maintain [NDCs] that will contribute to the long-term goals of the *Paris Agreement* ...

Scope 3 emissions from the use of Project coal in overseas customer countries would be managed in accordance with customer countries commitments under the *Paris Agreement* (detailed in [the GHG Assessment]) and would not contribute to Australian greenhouse gas emissions or factor into Australian greenhouse gas reduction targets.

Any small quantities of Project product coal sold on the domestic market ... would likely be substituting or augmenting supply from existing coal sources. It is therefore anticipated these emissions would not increase Australia's current greenhouse gas emissions." (emphasis added)

100 The reference to the GHG Assessment is important. Section 5.4 of the GHG Assessment was headed "Potential Impacts *of* the Project" (emphasis added). It stated, as repeated in Section 7.21.3, that Scope 1 and 2 emissions would be significantly less than Scope 3 emissions, and that most Scope 3 emissions would occur overseas, representing 0.065 per cent of the total anthropogenic greenhouse gas emissions globally.⁶⁵ The GHG Assessment also noted countries' obligations under the Paris Agreement, and then stated that each country will have its own range of options to reduce emissions, having regard to its economic priorities and physical attributes.

101 Section 7.21.4 of the EIS, headed "Project Greenhouse Gas Mitigation Measures", provided that "[e]xisting greenhouse gas mitigation and management measures implemented at the Mount Pleasant Operation in accordance with the Air Quality and Greenhouse Gas Management Plan would continue for the Project". The EIS explained that, as diesel fuel consumption represented more than half of estimated "direct" (or Scope 1) emissions, the existing measures generally focused on minimising greenhouse gas emissions through the efficient use of diesel. The EIS went on to state that as part of the Project, MACH would review and update existing Scope 1 greenhouse gas minimisation measures, and investigate whether it was reasonable and feasible to also reduce Scope 2 greenhouse gas emissions associated with on-site electricity use. Scope 3 emissions were not addressed.

102 Section 7.21.5, headed "Potential Impacts of Climate Change *on* the Project" (emphasis added), stated:

"Due to the inherent uncertainties associated with climate change projections, the potential impacts of climate change *on* the Project cannot be determined with a high degree of confidence.

Notwithstanding, climate change projections indicate average temperatures are likely to rise in the vicinity of the Project, and extreme temperature events may increase in frequency. This suggests that bushfire activity may become more prevalent in the region. In addition, rainfall has the potential to both increase and decrease, particularly seasonally, with heavier rainfall events likely to become more frequent." (emphasis added)

Section 7.21.5 repeated statements found in Section 5.5 of the GHG Assessment, which addressed "Potential Impacts *on* the Project" (emphasis added), and Section 5.3 of the GHG Assessment.

103 Section 7.21.6, headed "Adaptive Management", specified how MACH would manage its contribution to Australian greenhouse gas emissions,

65 See [99] above.

including through reporting under the NGER Act. It also stated that "MACH has considered the key potential climate change risks *to* the Project (namely increased frequency of bushfires, water reliability during dry periods and storm surges) in the design of the Project. MACH would continue to assess climate change risks on an ongoing basis via implementation of an adaptive management approach" (emphasis added).

Section 8 of the EIS – Evaluation and Conclusion

104 Section 8 provided a summary evaluation and conclusion for the EIS, including, relevantly, the "relevant planning considerations and policy objectives" (Section 8.3) and "key potential biophysical, economic and social impacts and benefits" (Section 8.4).

105 Section 8.3.3 acknowledged that, in evaluating the development application for the Project, the consent authority was required to take into consideration the matters listed in s 4.15(1) of the EPA Act. It stated that the EIS had been prepared to "address the requirements of section 4.15(1) to assist the Minister or the [Commission] in evaluating the Project".

106 Section 8.3.4, headed "Potential Implications of Climate Change", reiterated earlier statements that the Project's contribution to global climate change effects would be proportionate to its contribution to greenhouse gas emissions,⁶⁶ and also repeated earlier estimations of the Project's Scope 1 and Scope 2 emissions⁶⁷ and Scope 3 emissions.⁶⁸ Section 8.3.4 then repeated the statement that MACH had considered the key potential climate change risks *to* the Project.⁶⁹

107 Section 8.3.5 was headed "Ecologically Sustainable Development Considerations". Under the sub-heading "Greenhouse Gas Emissions, Biological Diversity and Ecological Integrity", the EIS "acknowledged that (subject to the efficacy of national and international greenhouse gas abatement measures) all sources of greenhouse gas emissions in NSW, irrespective of their scale, will contribute in some way towards the potential global, national, state and regional effects of climate change".

108 The EIS then identified that "approximately 96% of the estimated total Scopes 1, 2 and 3 emissions are associated with the end use of the Project product coal by customer organisations (i.e. primarily for electricity generation).

66 See [98] above.

67 See [98] above.

68 See [99] above.

69 See [103] above and [156] below.

Emissions associated with the end use of Project coal would, therefore, be managed under the NDCs of these countries". It acknowledged that the potential impacts of Scope 1 and 2 emissions of the Project had been valued in an "Economic Assessment", and that "[f]urther consideration of the Scope 3 emissions associated with the use of Project product coal" was in Section 8.4.1.

109 The EIS then explained that the Economic Assessment indicated that "a net benefit of \$855 million" in net present value would be forgone if the Project was not implemented (where the net benefit was "net of the value of externalities including Scope 1 and 2 greenhouse gas emissions"). It then stated that Scope 3 emissions were not included in the calculation, consistent with economic assessment convention (where economic impacts of an activity are considered in the country where the activity takes place). The EIS emphasised that the Paris Agreement seeks to avoid double counting of emissions, and then stated:

"Notwithstanding, Scope 3 greenhouse gas emissions that may be emitted by other parties, such as from the use of the product coal produced by the Project, are considered in this EIS. On average, over the life of the Project, the indirect (i.e. Scope 3) emissions from these activities are estimated to be approximately 33.1 Mt CO₂-e per year ...

These (typically electricity generation) greenhouse gas emissions would be accounted for under the customer countries NDCs under the *Paris Agreement* ..." (emphasis added)

110 Section 8.4 was headed "Evaluation of Key Impacts and Benefits". In Section 8.4.1, headed "Key Potential Impacts", the EIS relevantly summarised the "Potential Indirect Adverse Impacts" associated with the Project as including greenhouse gas emissions:

"[C]onsultation has also identified concerns regarding Scope 1 and Scope 2 greenhouse gas emissions from NSW coal mining developments, and Scope 3 greenhouse gas emissions (e.g. overseas greenhouse gas emissions from the use of Project product coal) potentially contributing to global climate change effects".

The EIS again acknowledged that, subject to the efficacy of abatement measures, all sources of greenhouse gas emissions would contribute in some way to the effects of climate change.

111 The EIS reiterated that the Project's relative contribution to global climate change effects would be proportional to its contribution to greenhouse gas emissions. The EIS also repeated that Project product coal sold on the domestic

market would be substituting existing supply, thus not increasing Australia's greenhouse gas emissions.⁷⁰ The EIS then stated:

"MACH would manage its contribution to Australian greenhouse gas emissions inventories through reporting under the NGER Act, as well as other applicable government initiatives and policies implemented to manage emissions at the national level under Australia's progressive NDCs."

Department's assessment report

112 The Department prepared an assessment report addressing the Project, which it submitted to the Commission on 31 May 2022. In the executive summary, regarding the assessment of greenhouse gases, the Department's assessment report stated:

"The Department recognises that [greenhouse gas] emissions and climate change is a matter of interest to many members of the broader community, and was raised in many public submissions.

The [GHG Assessment] indicates that the majority (98%) of [greenhouse gas] emissions generated by the [P]roject comprise Scope 3 emissions that would arise from the downstream consumption of coal by end users. Under the Paris Agreement accounting rules and Australian legislation, Scope 3 emissions are not included in Project emission reporting, to avoid double counting."

113 The assessment report explained that Scope 1 and Scope 2 emissions associated with the Project would have a relatively low emissions intensity compared to other coal mining projects. It then stated:

"The [P]roject's emissions have been accounted for in the NSW [greenhouse gas] emissions projections in the NSW Government's Net Zero Plan.

The Department accepts that the [P]roject 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."

114 In the evaluation section of the executive summary, the Department recorded that it had undertaken a comprehensive assessment of the Project in

70 See [99] above.

accordance with the requirements of the EPA Act. The Department re-acknowledged community concerns about greenhouse gas emissions and climate change and stated that it had "carefully considered the additional emissions over the life of the mine ... in the context of international, Commonwealth and State policy settings". The Department recommended a "comprehensive and precautionary suite of conditions to ensure that the [P]roject would comply with acceptable criteria and standards, that the impacts would be consistent with MACH's predictions, and that residual impacts would be effectively minimised, managed and/or at least compensated".

115 In the body of the assessment report, after recording that greenhouse gas emissions are divided into Scopes 1, 2 and 3, the assessment report recorded, again, that 98 per cent of emissions generated due to the Project were those associated with the downstream burning of the product,⁷¹ expressly identified as "Scope 3 indirect emissions". It recorded that the Scope 3 emissions represented a very small proportion (approximately 0.06 per cent) of yearly global emissions.

116 Next, the Department explained that the Climate and Atmospheric Science ("CAS") branch (within the Environment, Energy and Science group within the Department) had confirmed the Project had been accounted for in the NSW Government's Net Zero Plan, but that CAS nonetheless recommended "that MACH be required to provide a more detailed consideration of Scope 1 and 2 [greenhouse gas] mitigation measures, particularly in regard to diesel consumption, fugitive methane emissions ... and the feasibility of purchasing offsets for emissions". The Department recorded that the EIS was "relatively light" on the detail of the mitigation measures proposed by MACH.⁷²

117 The Department recommended conditions to minimise Scope 1 and 2 emissions:

"To ensure that [greenhouse gas] emissions are minimised to the greatest extent practicable, the Department has recommended conditions requiring MACH to:

- limit [greenhouse gas] emissions to no greater than predicted in the EIS and subsequent additional information ..., through strict Scope 1 and 2 performance measures; and
- regularly review new technologies and other options to further reduce Scope 1 and 2 [greenhouse gas] emissions, and implement

71 See [112] above.

72 See [101] above.

41.

these measures where reasonable and feasible to continually reduce [greenhouse gas] emissions over the duration of the [P]roject."

The Department did not recommend conditions be imposed in relation to Scope 3 emissions.

118 In its conclusion on greenhouse gases, the Department stated that it considered that MACH had appropriately assessed the potential air quality and greenhouse gas impacts associated with the Project. It is to be recalled that MACH had identified in the EIS the greenhouse gas impacts associated with the Project, including Scope 3 emissions.⁷³ However, although the Department considered that the EIS was "light on detail of [greenhouse gas] mitigation measures", the Department only recommended conditions be imposed in relation to Scope 1 and 2 emissions. Other than to record that the Project's Scope 3 emissions represented a very small proportion of yearly global emissions and that those emissions were counted by a country other than Australia, the Department did not consider or recommend conditions in relation to Scope 3 emissions.

Commission consent

119 On 6 September 2022, the Commission, as the consent authority, approved the development application, and issued the consent subject to conditions in an attached Schedule 2. Those conditions were summarised as being required to:

- "• prevent, minimise, or offset adverse environmental impacts;
- set standards and performance measures for acceptable environmental performance;
- require regular monitoring and reporting; and
- provide for the ongoing environmental management of the development."

120 Schedule 2 was divided into parts. Part A addressed "administrative conditions", the first of which was an "obligation to minimise harm to the environment":

"In addition to meeting the specific performance measures and criteria established under this consent, [MACH] must implement all reasonable and

73 See [95]-[96] above. As indicated, the "assessment boundary" for the Project in the diagram in the GHG Assessment included Scope 3 emissions, both upstream and downstream.

feasible measures to prevent, and if prevention is not reasonable and feasible, minimise, any material harm to the environment that may result from the construction and operation of the development, and any rehabilitation required under this consent."

121 The next conditions (conditions A2 to A10) addressed the terms of consent and the limits of the consent. Relevantly, the conditions stated that the development may only be carried out "in compliance with the conditions of this consent" and "generally in accordance with the EIS". The limits of the consent included geographic and temporal limitations (conditions A5 and A10), as well as limits on the quantity of coal that could be extracted and transported from the site (conditions A6 to A9).

122 Part B of Schedule 2 contained "specific environmental conditions". In relation to greenhouse gas emissions, the consent set out seven conditions (conditions B31 to B37). The content of those conditions was extensive, but critically, the conditions only addressed Scope 1 and Scope 2 emissions. None of the conditions addressed Scope 3 emissions, and no party contended otherwise.

Commission's statement of reasons

123 Section 3 of the Commission's statement of reasons contained "The Commission's Consideration". In Section 3.1, headed "Material Considered by the Commission", the Commission recorded that it considered, relevantly: the EIS, public submissions and written comments, the Department's assessment report and the Department's recommended conditions of consent. Relevantly, DAMSHEG had submitted written submissions to the Commission on 20 July 2022, drawing attention to the fact that MACH had "not identified any measures to minimise the [greenhouse gas] emissions, including the Scope 3 emissions, of the Project to the greatest extent practicable".

124 Under the heading "Mandatory Considerations", the Commission stated that it was "required by section 4.15(1) of the [EPA Act] to take into consideration such of the listed matters as are of relevance to the development the subject of the [a]pplication". In a table titled "Mandatory Considerations", the Commission then identified the Resources SEPP as a relevant environmental planning instrument and stated that the likely impacts of the application had been considered in Section 5 of the statement of reasons.⁷⁴

74 See [127] below.

125 Under the heading "Additional Considerations", the Commission recorded that it had also considered, among other things, the Paris Agreement and the Commonwealth Government's Long-Term Emissions Reduction Plan.

126 Under the heading "Key Issues Raised", the Commission provided a non-exhaustive summary of the submissions it had received and the key issues they raised. In relation to one of those issues, greenhouse gas emissions and climate change, the Commission stated:

"70. The Commission received submissions that raised [greenhouse gas] emissions and the impact the increase in mining would have on climate change. Submissions noted the cumulative impact that [greenhouse gas] emissions would have and noted that while Scope 3 emissions are not counted towards NSW's emissions under the Paris Agreement, the impact is still felt globally.

71. Submissions were received by the Commission that noted that while they were concerned for environmental impacts and climate change, they were also concerned that, should the mine close, nearby towns, communities and families would suffer. Some submissions commented that the reliance on coal would continue to be important over the next 20 years until appropriate alternative energy supplies are available to Australia, noting a need for a transition period away from coal.

72. The Commission received submissions that put forward their support for the [a]pplication, stating that high-quality and low emission coal from the mine results in overall lower [greenhouse gas] emissions."

127 Section 5, headed "Key Issues", had separate sub-sections addressing each of the "likely impacts" the Commission identified, including Section 5.3, which addressed greenhouse gas emissions specifically.⁷⁵ As will be explained below, the structure of Section 5.3 is important.

128 The Commission defined Scope 1, 2 and 3 emissions in a manner consistent with the GHG Protocol and the EIS.⁷⁶ The Commission then addressed international, national and State initiatives to address greenhouse gas emissions. The Commission identified, at the international level, that Australia was a signatory to the Paris Agreement, and had committed under the Paris Agreement to reduce national greenhouse gas emissions by 2030. The Commission stated:

75 Section 5.1 addressed noise and Section 5.2 addressed air quality.

76 See [92]-[94] above.

"The UNFCCC and related articles specify that all emissions associated with an activity within Australia's border count towards Australia's total emissions.

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

129 The Commission then addressed national measures. The Commission referred to the Commonwealth Government's National Greenhouse and Energy Reporting Scheme, the framework established by the NGER Act, but noted that the Scheme does not require the reporting of Scope 3 emissions. The Commission also acknowledged the previous Commonwealth Government's Long-Term Emissions Reduction Plan, as well as the commitment by the current Commonwealth Government to "legislating a 43% reduction in [greenhouse gas] emissions by 2030".

130 At the State level, the Commission acknowledged that there was a range of relevant NSW climate change policy and guidance, including a target of net zero emissions by 2050, and a focus on limiting fugitive emissions from coal mining. The Commission observed that the NSW Government: had entered into a memorandum of understanding with the Commonwealth Government which aimed, in part, to achieve emissions reductions; had established the "Coal Innovation Fund" to support research, development and demonstration of low emissions coal technologies; and had released its Net Zero Plan. Acknowledging that fugitive emissions from coal and gas made up approximately nine per cent of NSW greenhouse gas emissions as of 2018-2019, the Commission observed that limiting fugitive emissions from coal mining was important to reduce the State's emissions under the Net Zero Plan. Critically, the Commission recorded that "[i]n the NSW policy context", the Commission was expressly required to consider the matters in cl 2.20(1) and (2) of the Resources SEPP.

131 The Commission summarised the estimated greenhouse gas emissions of the Project, based on MACH's EIS and set out in the Department's assessment report.⁷⁷ The Commission set out the estimated Scope 1, 2 and 3 emissions for the Project, and noted again that 98 per cent of the total emissions generated due to the Project were those associated with the downstream burning of the product.⁷⁸

77 After MACH lodged its EIS, it provided updated greenhouse gas emission estimations dated 31 March 2022.

78 See [112] and [115] above.

132 The Commission then provided a detailed summary of the nature and extent of the anticipated Scope 1 and 2 emissions of the Project, highlighting that they would be within the current Safeguard Mechanism baseline emissions for the Project. After this, the Commission stated:

"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 [greenhouse gas] 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.*" (emphasis added)

133 The Commission then summarised its findings, first in relation to Scope 3 emissions, emphasising that:

"152. The Commission received submissions that raised concerns regarding the Project's [greenhouse gas] 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 [greenhouse gas] 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 [greenhouse gas] emissions and to track their progress in doing so." (emphasis added)

134 The Commission then set out the requirements in cl 2.20(1). From this point, the discussion concerned only Scope 1 and 2 emissions:

"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 [EPA 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 [NSW Climate Change Policy Framework], the Net Zero Plan or Australia's current obligations under the Paris Agreement in respect of Australia's current NDC's."

135 The Commission considered conditions to minimise Scope 1 and 2 emissions in some detail.⁷⁹ The Commission stated that it had set "specific [greenhouse gas] performance measures for Scope 1 and Scope 2 emissions for the Project". The specific measures to which it referred were condition B31, conditions B32 and B34, and condition B36. Those conditions were only concerned with Scope 1 and Scope 2 emissions. The Commission did not refer to Scope 3 emissions.

136 Finally, the Commission concluded that "[s]ubject to the imposed conditions, the Commission is satisfied that the Project can achieve the requirements of the Resources SEPP, the [EPA Act] and the relevant Commonwealth and NSW policy positions". The Commission affirmed that the greenhouse gas emissions for the Project were "adequately assessed", acknowledging the NSW Government's Net Zero Plan and the need to undertake mining "sensitively to minimise impacts on the environment".

137 Section 6, "The Commission's Findings and Determination", relevantly concluded that:

"The Commission has carefully considered the Material before it as set out in section 3.1 of this report. Based on its consideration of the Material, the Commission finds that the Project should be approved subject to stringent conditions of consent for the following reasons:

...

- the [greenhouse gas] emissions for the Project have been adequately estimated and are permissible in the context of the current climate change policy framework;

79 Fugitive emissions are Scope 1 emissions: see [95] above.

47.

- opportunities exist for [MACH] throughout the life of the Project to deploy existing, emerging and future technologies to improve the abatement of [greenhouse gas] emissions".

Decisions below

Land and Environment Court of NSW

138 DAMSHEG's application for judicial review of the Commission's decision to grant the development consent, filed in the Land and Environment Court of NSW, relied on eight grounds. Only two grounds are relevant to this appeal.

139 First, "[i]n purporting to consider s 4.15(1)(a)(i) of the EPA Act, the Commission failed to consider whether the consent should be issued subject to conditions aimed at ensuring that greenhouse gas emissions are minimised to the greatest extent practicable as required by cl 2.20(1) of the [Resources SEPP]". Second, "[t]he 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". DAMSHEG's contentions were that the Commission "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".

140 The primary judge rejected the contention that the Commission had failed to consider cl 2.20(1)(c) of the Resources SEPP as required by s 4.15(1)(a)(i). His Honour found that the proper inference from the Commission's reasoning as a whole was that it had exercised its discretion not to attach conditions specifically directed to Scope 3 emissions, for the reasons it gave.

141 The primary judge also rejected the contention that the Commission had misunderstood and failed to consider s 4.15(1)(b). Given the weight of evidence before the Commission and its acceptance of the effects of climate change, his Honour concluded that there was no need for the Commission expressly to mention "specific impacts" such as bushfire risk, increased precipitation, changes in precipitation patterns and the like, because these were "largely impacts of climate change generally".

NSWCA

142 DAMSHEG appealed to the NSWCA pursuant to s 58(1) of the LEC Act. That appeal was not merits review. DAMSHEG's contention was that

the Commission failed to take into account two mandatory relevant considerations: first, cl 2.20(1)(c) of the Resources SEPP, which required it to consider, relevantly, whether to impose conditions on Scope 3 emissions; and second, the likely impacts of the development on the natural and built environment in the locality of the mine, as required by s 4.15(1)(b) of the EPA Act.

143 The NSWCA rejected DAMSHEG's contention that there was a failure to comply with cl 2.20(1)(c) of the Resources SEPP. Ward P held that the Commission had complied with cl 2.20(1)(c):

"The Commission was clearly cognisant of the distinction between the three categories of emissions. The fact that the Commission accepted that Scope 3 emissions were 'regulated' as well as accounted for elsewhere is a sufficient indication that the Commission considered there to be no need for the imposition of minimisation conditions in relation to the Scope 3 emissions."

144 Adamson JA similarly held that "it cannot be inferred that the Commission failed to consider whether conditions ought be imposed on Scope 3 emissions", stating that:

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

145 Ward P and Adamson JA both stated that DAMSHEG had made a "forensic choice" not to propose conditions to minimise the effect of Scope 3 emissions. While there was no evidentiary or legal obligation for it to have done so, Ward P then stated that this choice prevented DAMSHEG from now complaining that the Commission had failed to consider imposing such conditions.

146 The NSWCA held that the Commission had not complied with s 4.15(1)(b) of the EPA Act. Ward P held that there was nothing to indicate that the Commission considered "the impact of climate change on the locality (which was the required causal enquiry)". Ward P stated that:

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

147 The NSWCA unanimously allowed the appeal on DAMSHEG's second ground and remitted the matter to the Land and Environment Court of NSW for consideration under Div 3 of Pt 3 of the LEC Act.⁸⁰

Issues in this Court

148 The appeal and the amended notice of contention in this Court concern different aspects of s 4.15(1).⁸¹ The first issue concerns the proper construction of s 4.15(1)(b). The second issue concerns the proper construction and application of s 4.15(1)(a). The third issue, which it is unnecessary to determine, concerns a finding by the NSWCA that climate change was an environmental impact of the development in the locality. Each issue will be addressed in turn.

First issue – s 4.15(1)(b) of the EPA Act

149 In this Court, MACH contends that the NSWCA erred in its construction of s 4.15(1)(b),⁸² by construing s 4.15(1)(b) as imposing a requirement to consider environmental impacts of a development on the natural and built environments "in the locality". For the reasons that follow, that submission should be accepted. Close analysis of the NSWCA's reasons demonstrates that it incorrectly treated the words "in the locality" that appear at the end of s 4.15(1)(b) as applying to the whole paragraph, incorrectly characterising the mandatory requirement as an obligation to take into consideration the likely impacts of that development *in the locality*.

80 See [78] above.

81 See [76]-[79] above.

82 See, eg, *Palmanova Pty Ltd v The Commonwealth* (2025) 99 ALJR 1362 at 1364-1365 [4]; 424 ALR 768 at 769-770.

Proper construction of s 4.15(1)(b)

150 Section 4.15(1)(b) of the EPA Act requires a consent authority to take into consideration, where relevant, "the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality". The opening general clause – "the likely impacts of that development" – as amplified by the inclusive clause – "including environmental impacts on both the natural and built environments, and social and economic impacts in the locality" – requires the Commission to take into consideration the likely impacts of the development, provided they are relevant to that development.

151 This may be described as a two-stage analysis. First, the consent authority must identify what are the "likely impacts" of the development. In relation to that step, it is for the Commission to identify the "likely impacts" of the particular development,⁸³ subject to an implied requirement of reasonableness.⁸⁴ Second, the consent authority must "take into consideration" those likely impacts of the development. That obligation is properly construed as an obligation to take those matters "into account and to give weight to them as a fundamental element" in making the determination.⁸⁵

152 The phrase "likely impacts of [the] development" in s 4.15(1)(b) contains no geographic limit. The examples that follow the first comma are non-exhaustive (as is shown by the word "including"). The first example, the "environmental impacts on both the natural and built environments", contains no geographic limit.⁸⁶ The "environment" is defined broadly,⁸⁷ and the "impacts" referred to in s 4.15(1)(b) may be direct or indirect consequences of the proposed development. Those impacts may be local, national or global, depending on the nature of the development in question. But the Commission's

83 *Ross v Lane* (2022) 255 LGERA 136 at 165 [102].

84 *Li* (2013) 249 CLR 332 at 350 [26].

85 See [83] above.

86 This accords with and reflects the predecessor provisions: EPA Act (as in force on 30 June 1998), s 90(1)(b) and (d); *Environmental Planning and Assessment Amendment Act 1997* (NSW), s 3, Sch 1, item 32; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 1997 at 828; *Environmental Planning and Assessment Amendment Act 2017* (NSW), Sch 4.2, item 1.

87 Section 1.4(1) provides that "environment" "includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings".

obligation under s 4.15(1)(b) is to identify *and* "take into consideration" all those impacts.

Commission did not err

153 Having established that the NSWCA erred in its construction of s 4.15(1)(b),⁸⁸ it then becomes necessary to consider Ground 2 of DAMSHEG's amended notice of contention that the NSWCA should have found that the Commission was required to consider the likely impacts of climate change in NSW and the Hunter Valley because of the evidence before the Commission, including the material in MACH's EIS. DAMSHEG required leave to amend its notice of contention to raise this ground. Leave should be granted but, for the reasons that follow, the ground should be dismissed.

154 DAMSHEG submitted that the "relevant likely environmental impacts of the Project, for the purpose of s 4.15(1)(b), as revealed by [MACH's] EIS and the evidence before the [Commission], included the specific and disproportionate impacts climate change would have in the Hunter Valley region, and in NSW" and the Commission was "thus required to consider those impacts". DAMSHEG's contention was that the Commission "failed to address at all the climate change impacts of [MACH's] Project's [greenhouse gas] emissions, in the form of temperature rises, and increases in extreme weather events, bushfires and heavy rainfall events in NSW and the Hunter Valley, which [MACH] itself had specifically identified in its own EIS".⁸⁹

155 The relevant section of the EIS is Section 7.21.5, headed "Potential Impacts of Climate Change on the Project". As outlined above, this section addresses the impacts *of* climate change *on* the Project.⁹⁰ This analysis draws upon the GHG Assessment, which the EIS describes as providing an "assessment of the potential greenhouse gas emissions and climate change impacts of the Project, and potential impacts of climate change *on* the Project". Section 5.4 of the GHG Assessment addresses the "Potential Impacts *of* the Project", whereas Section 5.5 of the GHG Assessment addresses the "Potential Impacts *on* the Project".⁹¹

156 Section 7.21.6, headed "Adaptive Management", is also of relevance. Section 7.21.6 records that "MACH has considered the key potential climate

88 See [149] above.

89 See [102]-[103] and [106] above.

90 See [102] above.

91 See [100] and [102] above.

change risks *to* the Project" and that MACH would continue to assess climate change risks on an ongoing basis.⁹²

157 DAMSHEG's submission should be rejected.

158 First, the obligation imposed by s 4.15(1)(b) is to take into consideration "the likely impacts of [the] development", which include environmental impacts. Properly construed, s 4.15(1)(b) does not impose any obligation to consider particular sub-issues which might be said to be likely environmental impacts of the Project. Such a construction is not supported by the broad language of s 4.15(1)(b), which suggests an intention to confer a broad discretion on the consent authority (in this case, the Commission) to determine the likely impacts of a development. A construction of s 4.15(1)(b) that requires the consent authority to identify and expressly consider every possible impact of a development at the level of specificity advocated for by DAMSHEG risks rendering the scheme administratively unworkable. It also risks courts engaging in *de facto* merits review, by analysing the evidence presented to the consent authority to identify all of the "likely impacts" conceivably raised, before determining whether each has been considered by the consent authority.

159 In the present case, in Section 5 of the statement of reasons, the Commission identified that it was required by s 4.15(1)(b) to take into consideration the likely impacts of the development.⁹³ Section 5 was divided into separate sub-sections addressing each of the "likely impacts" the Commission identified, with Section 5.3 addressing greenhouse gas emissions.⁹⁴ The Commission identified the likely quantity of Scope 3 emissions and that they would make up 98 per cent of the total emissions generated by the Project. It observed that coal mining and combustion are "a major contributor to anthropogenic climate change, which has the potential to impact future generations" and that "while Scope 3 emissions are not counted towards NSW emissions, the cumulative impact of [greenhouse gas] emissions is still felt globally". This was sufficient to discharge the obligation under s 4.15(1)(b) to identify and consider this impact of the development.

160 The matter may be tested this way. The Court is being asked to hold that the Commission (an independent body required to conduct a public hearing into the development, and identify and assess its likely impacts) failed to take into

92 See [103] above.

93 See [124] above.

94 Section 5.1 addressed noise. Section 5.2 addressed air quality.

consideration one "impact" described in passing in a few lines of the EIS.⁹⁵ The Commission's failure to consider this particular sub-issue must be considered in the context of the Commission's reasons taken as a whole. The Commission identified and took into consideration a number of other environmental impacts in the locality of the development, including noise impacts, impacts on air quality in the Upper Hunter region, impacts on two places of State heritage significance in the area surrounding the mine, impacts on local Aboriginal cultural heritage, impacts on surface and groundwater in the locality, the increase in the size of the "void" eventually left by the mine, the impact on biodiversity in the region (including on a threatened species of legless lizard identified in the area), and the visual impacts of the mine.

161 DAMSHEG's contention, if accepted, risks requiring a court conducting a judicial review application to delve into the merits of the Commission's consideration of each of these individual sub-issues. DAMSHEG's contention is also inconsistent with the approach taken by intermediate appellate courts to the construction of the EPA Act. For example, in *Notaras v Waverley Council*, in relation to s 79C of the EPA Act (which is now s 4.15), Tobias JA (with whom Mason P and Hodgson JA agreed) stated that: ⁹⁶

"It is not for a party affected by a decision, or a reviewing court to make an exhaustive list of the matters which a decision maker might conceivably regard as relevant then attack the decision on the ground that a particular one of them was not specifically taken into account".

Tobias JA considered the risk of the contrary approach to be that the court may "express the conclusion in terms of a recognised ground of review while in truth making a decision on the merits".⁹⁷ Similarly, in *Upper Mooki Landcare Inc v Shenhua Watermark Coal Pty Ltd*, Preston CJ stated that it is "wrong to suggest that a generally expressed head of consideration, such as s 79C(1)(b) of the EPA Act, requires resolution or factual findings on various subtopics".⁹⁸

95 See [102]-[103] above.

96 *Notaras* (2007) 161 LGERA 230 at 261 [120], quoting *Walsh v Parramatta City Council* (2007) 161 LGERA 118 at 130-131 [58], in turn citing (inter alia) *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375. That passage was subsequently cited with approval and applied in *Minister for Planning v Walker* (2008) 161 LGERA 423 at 449 [35].

97 *Notaras* (2007) 161 LGERA 230 at 261 [120].

98 *Upper Mooki Landcare* (2016) 216 LGERA 40 at 73 [136]. See also 74 [141].

162 Second, the fact that there was evidence before the Commission about the likely environmental impacts in the locality caused by climate change due to greenhouse gas emissions does not transform this into a mandatory consideration. It was for the Commission to identify the likely impacts of the development for the purposes of s 4.15(1)(b). While the exercise of that power is subject to implied constraints (such as a condition that it must be exercised reasonably),⁹⁹ DAMSHEG made no allegation of unreasonableness before the NSWCA. DAMSHEG's only ground of appeal before the NSWCA was that the primary judge erred in concluding that the Commission complied with s 4.15 of the EPA Act because "the Commissioner [sic] did not take into consideration, in the manner required by s 4.15", specified matters.

163 Third, even if it were appropriate for this Court to review the Commission's characterisation of the "likely impacts" of the development (and it is not), the passages of the EIS relied upon by DAMSHEG are concerned with the impact *of* climate change *on* the development and its locality. They are not concerned with the likely impacts *of* the development itself. It is not to the point that the EIS acknowledged, in a different section,¹⁰⁰ that the Project's "contribution to climate change, including the associated environmental impacts, would be in proportion with its contribution to global greenhouse gas emissions".¹⁰¹ Such a general statement, in a different section of the EIS, is not sufficient to evidence a separate "likely impact" that the Commission was required to take into consideration.

Second issue – s 4.15(1)(a) of the EPA Act

164 This issue concerns the proper construction and application of s 4.15(1)(a) and whether the Commission took into consideration cl 2.20(1)(c) of the Resources SEPP, as required by s 4.15(1)(a)(i) of the EPA Act.

Parties' submissions

165 DAMSHEG submitted that the NSWCA erred in holding that the Commission took into consideration cl 2.20(1)(c) of the Resources SEPP, as required by s 4.15(1)(a)(i) of the EPA Act. DAMSHEG submitted that cl 2.20(1)(c) should be construed as requiring a consent authority to separately consider whether to impose what might be called minimisation conditions for Scope 1, 2 and 3 emissions and that the Commission failed to consider whether the consent should be issued subject to minimisation conditions for Scope 3

99 See, eg, *Li* (2013) 249 CLR 332 at 350 [26].

100 Section 7.21.3 (headed "Quantitative Assessment of Potential Greenhouse Gas Emissions").

101 See [98] above.

emissions. DAMSHEG further submitted that the NSWCA erred in attributing the Commission's omission to a "forensic choice" by DAMSHEG.

166 In addition, DAMSHEG submitted that the NSWCA erred in respect of the Commission's finding that Scope 3 emissions were "regulated" through broader policies and agreements, as those matters did not address whether those emissions were minimised to the greatest extent practicable; and that the NSWCA disregarded the structure of the Commission's reasons, which only referred to the overseas regulation of Scope 3 emissions prior to its consideration of cl 2.20(1)(c).

167 DAMSHEG submitted that no inference could be drawn that the Commission considered imposing conditions to minimise Scope 3 emissions because: (1) no party proposed any conditions; (2) given that 98 per cent of the Project's emissions were Scope 3 emissions it is reasonable to suppose the Commission would have expressly addressed the imposition of conditions had it considered this issue; and (3) the fact that the Commission considered imposing conditions to minimise Scope 1 and 2 emissions in detail supports the inference that it did not consider imposing conditions in relation to Scope 3 emissions.

168 MACH opposed these submissions on two grounds. First, MACH submitted that DAMSHEG misconstrued the relevant obligation on the basis that s 4.15(1)(a)(i) of the EPA Act obliged the Commission only to consider the terms of the Resources SEPP, not to treat it as a binding statute. MACH submitted that cl 2.20(1)(c) is only capable of requiring the Commission to consider imposing conditions to minimise "greenhouse gas emissions" and it does not descend to the level of particularity of requiring consideration of conditions to minimise Scope 3 emissions. Second, MACH submitted that, in any event, the Commission *did* consider the matters in cl 2.20(1)(c) because the Commission: (1) was aware of, and stated that it had taken into account, the matters in cl 2.20(1)(c); (2) was clearly cognisant of distinctions between emission scopes; (3) took into account material concerning Scope 3 emissions and concluded that "[s]ubject to the imposed conditions", the Project could "achieve the requirements of the Resources SEPP" and the EPA Act; (4) took into account DAMSHEG's submissions, which drew attention to the fact that conditions to minimise Scope 3 emissions had not been imposed; and (5) reasoned in a manner that was unsurprising given no conditions to minimise Scope 3 emissions were proposed.

Commission did not consider imposing conditions on Scope 3 emissions

169 The Commission was required to consider imposing conditions to minimise to the greatest extent practicable all greenhouse gas emissions, including Scope 3

emissions, being those emissions identified in MACH's EIS.¹⁰² The Commission did not. Specifically, it failed to consider whether to impose conditions to minimise to the greatest extent practicable Scope 3 emissions. There is no basis upon which it may be inferred that the Commission considered that issue. DAMSHEG discharged the onus of establishing that the Commission failed to consider imposing conditions to minimise Scope 3 emissions to the greatest extent practicable. That error was "material" in the sense that there was a realistic possibility that the decision that was in fact made *could* have been different if the error had not occurred.¹⁰³ Each of those steps requires explanation.

Statutory construction

170 Clause 2.20(1)(c) imposes an obligation to "consider whether or not the consent should be issued subject to conditions aimed at ensuring ... that greenhouse gas emissions are minimised to the greatest extent practicable". That obligation formed part of the Commission's task under s 4.15(1)(a) of the EPA Act. Under s 4.15(1)(a), the Commission was required to "take into consideration" the provisions of the Resources SEPP, one of which was cl 2.20(1)(c). Accordingly, the Commission was required to consider issuing the consent subject to conditions aimed at ensuring "that greenhouse gas emissions are minimised to the greatest extent practicable". To so find does not involve treating the provisions of the Resources SEPP as a "binding statute", but rather involves applying the statute to identify the scope of the Commission's task. In this case, the scope of the Commission's task must be identified by a process of construing the terms of cl 2.20(1)(c).

171 The ordinary meaning of "greenhouse gas emissions" in cl 2.20(1)(c) includes all greenhouse gas emissions regardless of how they are categorised, described or counted. That is confirmed by the reference to "downstream emissions" in cl 2.20(2). The opening words of cl 2.20(2) specify that it operates "[w]ithout limiting [cl 2.20(1)]" and the evident intention was that "greenhouse gas emissions" have the same meaning in both subclauses.¹⁰⁴

172 The Commission was required by s 4.15(1)(a) of the EPA Act, read with cl 2.20(1)(c) of the Resources SEPP, to consider whether to issue the consent subject to conditions to ensure that *all* greenhouse gas emissions of the Project were minimised to the greatest extent practicable. That construction of

102 Resources SEPP, cl 2.20(2) read with cl 2.20(1)(c).

103 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 327 [7].

104 See *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* (2021) 252 LGERA 221 at 246-247 [97]-[101].

the applicable provision is consistent with Preston CJ's interpretation of the words "greenhouse gas emissions" as "including Scope 1, 2 and 3 emissions" in cl 14(1) of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) ("the Mining SEPP") (the predecessor to cl 2.20(1)) in *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*.¹⁰⁵

173 The requirement that the Commission *consider* imposing conditions to ensure that greenhouse gas emissions are minimised *to the greatest extent practicable* recognises that the imposition of such conditions will not always be possible or desirable. In *Mullaley*, for example, the Commission approved an application for development consent for the development of a new coal seam gas field but decided not to impose conditions to minimise Scope 3 emissions on the basis that "the Commission's view is that these emissions are outside the direct control of the Applicant and therefore not able to be reasonably conditioned".¹⁰⁶ Before reaching this conclusion, the Commission had sought clarification from the Department on this issue and the Department had provided a written response.¹⁰⁷ Preston CJ found that the Commission had complied with cl 14(1)(c) of the Mining SEPP, even though it had decided not to impose conditions to minimise Scope 3 emissions; what was critical was that the Commission had *considered* imposing such conditions.¹⁰⁸

174 The obligation to "consider" issuing the consent subject to conditions aimed at ensuring that greenhouse gas emissions are minimised to the greatest extent practicable is an obligation to engage in "'an active intellectual process' directed at the information".¹⁰⁹ Of course, that label "does not invite a court to undertake any form of review of the merits of a decision".¹¹⁰

105 (2021) 252 LGERA 221 at 246-247 [97]-[101].

106 *Mullaley* (2021) 252 LGERA 221 at 236 [42].

107 *Mullaley* (2021) 252 LGERA 221 at 234-235 [37], 236 [42].

108 *Mullaley* (2021) 252 LGERA 221 at 249-250 [110]-[111].

109 *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177 at 189 [12], 213 [77], quoting *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at 164 [59].

110 *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2024) 282 CLR 1 at 9 [6(a)], citing *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 599-600 [26].

What the Commission did and did not consider

175 DAMSHEG, as the party seeking to establish jurisdictional error, bears the onus, on the balance of probabilities, of proving that the Commission failed to take into consideration a mandatory consideration.¹¹¹

176 Clause 2.20(2) of the Resources SEPP imposes a requirement on the Commission "in determining a development application" to "consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development ... having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions". Here, the "assessment" was the GHG Assessment, summarised in Sections 7.21 and 8 of the EIS,¹¹² which the Commission considered.¹¹³

177 What the Commission did not consider, however, was the mandatory requirement in cl 2.20(1)(c) – whether to impose conditions to ensure that greenhouse gas emissions were minimised to the greatest extent practicable. In sum, under cl 2.20(1)(c), the Commission did consider whether to impose conditions to ensure that Scope 1 and 2 emissions were minimised to the greatest extent practicable. The Commission did not consider whether to impose conditions to ensure that Scope 3 emissions were minimised to the greatest extent practicable.

178 The imposition of conditions aimed at minimising Scope 1 and 2 emissions was not, in the circumstances of this case, sufficient to satisfy cl 2.20(1)(c), which required the Commission to consider whether to impose conditions to minimise to the greatest extent practicable *all* greenhouse gas emissions of the Project. In circumstances where Scope 3 emissions made up the vast majority (98 per cent) of the Project's total emissions and not only were identified but were within the "assessment boundary" for the Project,¹¹⁴ the Commission cannot be said to have discharged this obligation by considering only whether to impose conditions that minimised to the greatest extent practicable Scope 1 and 2 emissions – the remaining two per cent of the Project's emissions.

179 The Commission's failure to consider whether to impose conditions that minimised to the greatest extent practicable the Project's Scope 3 emissions is demonstrated by comparing the manner in which the Commission undertook its

111 *LPDT* (2024) 280 CLR 321 at 327-328 [9]-[10], [13].

112 See [89] above.

113 See [90]-[111] above.

114 See [95]-[96] above.

task in relation to the Project's Scope 1 and 2 emissions on the one hand, and the Project's Scope 3 emissions on the other.

180 The conditions imposed on the consent by the Commission can be mapped onto the Project's Scope 1 and 2 emissions that were within the "assessment boundary" for the Project. There were both generally applicable conditions and specific source conditions. Generally applicable conditions included condition B31(a)(iii), which required MACH to take all reasonable and feasible steps to "improve energy efficiency and minimise Scope 1 and Scope 2 [greenhouse gas emissions]"; condition B32(d)(ii), which required MACH to prepare to the satisfaction of the Planning Secretary an Air Quality and Greenhouse Gas Management Plan which described measures to "minimise the development's Scope 1 and 2 [greenhouse gas emissions]" and "improve the development's energy efficiency"; and condition B36, which required MACH to comply with performance measures for Scope 1 and 2 emissions limiting the annual carbon dioxide emissions for those emissions. Specific conditions were also relevant to limiting Scope 1 emissions on site (for example, from the combustion of diesel),¹¹⁵ and the use of explosives.¹¹⁶

181 The same mapping exercise cannot be undertaken in relation to the Project's Scope 3 emissions because there are no conditions that were imposed to minimise the Project's Scope 3 emissions. The Project's Scope 3 emissions within the "assessment boundary" included both upstream and downstream emissions.¹¹⁷ The "significant majority of the Scope 3 emissions from the use of Project coal would occur overseas". In the context of a development application which was to extend the life of the mine by 22 years and significantly expand its operations, there is no basis to find that the Commission considered whether to impose conditions that minimised to the greatest extent practicable the Project's Scope 3 emissions.

182 The Commission's consideration of Scope 3 emissions was limited to an analysis of whether they were "appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement)". "Scopes" is an accounting concept under those broader

115 See, eg, condition A32 (requirement that all plant and equipment "used on site, or to monitor the performance of the development" must be maintained and operated in a "proper and efficient" condition or manner).

116 See, eg, condition B22(a)(iii) (requirement to minimise "blast-related dust and fume emissions").

117 See [95]-[96] above.

national policies and international agreements.¹¹⁸ There is no reference to emissions "scopes" in the UNFCCC, the Paris Agreement, or any other international law at the treaty or customary level. The impact of greenhouse gas emissions is the same, regardless of how they are categorised.¹¹⁹

183 The fact that the Project's Scope 3 emissions, or even the majority of those emissions, might be counted in another country's emissions for the purposes of the Paris Agreement was relevant to the Commission's obligation to consider the GHG Assessment, summarised in Sections 7.21 and 8 of the EIS, "having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions" in cl 2.20(2). However, it does not address the Commission's obligation in cl 2.20(1)(c), which relates to all greenhouse gas emissions (including Scope 3 emissions), and which requires it to consider imposing conditions to minimise to the greatest extent practicable those emissions. The NSWCA erred in treating that analysis as evidence that the Commission had considered whether conditions should be imposed to minimise to the greatest extent practicable greenhouse gas emissions, including Scope 3 emissions. The issue, relevant to cl 2.20(2), of how greenhouse gas emissions were accounted for or regulated is different to the issue the Commission was required by cl 2.20(1)(c) to consider, which was the *minimisation* of those emissions to the greatest extent practicable. Consideration of matters such as whether Australia as a country, or MACH as the proponent, could or should ultimately be responsible for all of the Project's greenhouse gas emissions (including Scope 3 emissions) did not address the question posed by cl 2.20(1)(c) of the Resources SEPP. The question the Commission asked did not discharge the Commission's obligation under cl 2.20(1)(c).

184 The Commission's approach may be contrasted with that in *Mullaley*, where the Commission expressly considered imposing conditions to minimise Scope 3 emissions, even though it ultimately decided not to.¹²⁰

185 While the failure of a decision-maker to refer expressly to a mandatory relevant consideration in written reasons does not, in and of itself, prove that

118 See [92] above.

119 See also *Advisory Opinion on the Obligations of States in Respect of Climate Change* (International Court of Justice, 23 July 2025); *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* (Case No 31, International Tribunal for the Law of the Sea, 21 May 2024).

120 *Mullaley* (2021) 252 LGERA 221 at 249-250 [110]-[111]. See [173] above.

the matter was not considered by the decision-maker,¹²¹ there is no basis to infer that the Commission considered imposing conditions to minimise Scope 3 emissions to the greatest extent practicable despite not mentioning this in its reasons.

186 *First*, the fact that the Commission expressly considered imposing conditions to minimise Scope 1 and 2 emissions (which made up just two per cent of the total emissions) in some detail suggests that, if it had considered imposing conditions to minimise Scope 3 emissions (which made up 98 per cent of the Project's total emissions), it would have mentioned this expressly.

187 *Second*, the structure of the reasons supports the inference that the Commission did not consider whether to impose conditions to minimise Scope 3 emissions, as required by cl 2.20(1)(c). The Commission began with an analysis of the relevant Scope 1 and 2 emissions. It then turned to an analysis of the anticipated Scope 3 emissions, concluding that the Project's Scope 3 emissions "are appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement)".¹²² In this section, the Commission stated that it had "considered all emissions associated with the Project (including Scope 3 emissions) in its assessment and determination". But this statement must be read in the context of the immediately preceding sentence, in which the Commission agreed with the Department and acknowledged "that under the Paris Agreement accounting rules and Australian legislation, Scope 3 emissions are not included in Project emission reporting, to avoid double counting". The Commission's "consideration" of Scope 3 emissions was limited to the question of whether they would count towards the Project's emissions for accounting and reporting purposes, which was relevant to the discharge of its obligation under cl 2.20(2) but not to its separate obligation under cl 2.20(1)(c).

188 That statement must also be read in the context of the paragraphs that follow, in which the Commission went on to summarise its findings, again emphasising that the Project's Scope 3 emissions "are not counted towards NSW emissions" and that "under the Paris Agreement, Scope 3 emissions are attributed to the country within which they are emitted".¹²³ It was only after

121 *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* [2026] HCA 23 at [59]-[60].

122 See [150]-[151] of the Commission's reasons extracted at [132] above.

123 See [152]-[153] of the Commission's reasons extracted at [133] above.

reaching that conclusion, and putting Scope 3 emissions to one side, that the Commission went on to consider cl 2.20(1)(c).

189 From that point, the discussion concerned only Scope 1 and 2 emissions.¹²⁴ The Commission considered conditions to minimise Scope 1 and 2 emissions in some detail, before concluding that "[s]ubject to the imposed conditions, the Commission is satisfied that the Project can achieve the requirements of the Resources SEPP". However, this statement must be read in the context of the preceding analysis, which pushes to one side the Project's Scope 3 emissions.

190 *Third*, neither MACH nor the Department proposed conditions to limit Scope 3 emissions for the Commission to consider. In circumstances where the Commission did not have proposed conditions to minimise Scope 3 emissions before it and did not otherwise identify any conditions that could be imposed, there is no basis upon which to infer that the Commission considered imposing such conditions. It is not to the point that the Commission stated that it had considered material including DAMSHEG's submissions, in which it drew to the Commission's attention that no Scope 3 minimisation conditions had been proposed. The Commission did not even observe that no conditions had been proposed and, in any event, as outlined below, it was for MACH to propose conditions to minimise Scope 3 emissions.¹²⁵

191 The Commission therefore erred in failing to consider whether to impose conditions to minimise to the greatest extent practicable Scope 3 emissions.

Commission's error material

192 However, that is not the end of the matter. As was observed in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,¹²⁶ in most cases an error will only be jurisdictional if it is "material":

"In most cases, however, an error will only be jurisdictional if the error was material to the decision that was made in fact, in the sense that there is a realistic possibility that the decision that was made in fact *could* have been different if the error had not occurred. That is because it is now

124 See [154] of the Commission's reasons extracted at [134] above.

125 See [198] below.

126 (2024) 280 CLR 321 at 327 [7]. See also *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at 134 [29]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 444 [44]; *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 522 [33]; *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 102 [30], 132 [121].

accepted that a statute which contains an express or implied condition to be observed in a decision-making process is ordinarily to be interpreted as incorporating such a 'threshold of materiality' in the event of non-compliance." (emphasis in original; footnotes omitted)

193 The applicant for judicial review (DAMSHEG) must satisfy the court that the threshold of materiality is met, although meeting this threshold is not demanding or onerous.¹²⁷

"The question in these cases is whether the decision that was in fact made *could*, not *would*, 'realistically' have been different had there been no error. 'Realistic' is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable. Though the applicant must satisfy the court that the threshold of materiality is met in order to establish that the error is jurisdictional, meeting that threshold is not demanding or onerous." (emphasis in original; footnotes omitted)

Once this threshold is satisfied, it is for the respondent to the judicial review application to establish that the error could not have affected the decision.¹²⁸

194 There is nothing in s 4.15(1) or the EPA Act more generally to suggest that s 4.15(1) should be interpreted so that it does not require a threshold of materiality. In particular, the powers of the Land and Environment Court of NSW under Div 3 of Pt 3 of the LEC Act are only enlivened where a development consent granted under the EPA Act is "invalid".¹²⁹ The existence of those powers therefore says nothing about whether an error by a consent authority was jurisdictional in the first place.

195 No party submitted that the Commission's failure to consider imposing conditions to minimise Scope 3 emissions to the greatest extent practicable, as required by cl 2.20(1)(c) of the Resources SEPP and s 4.15(1)(a)(i) of the EPA Act, was not material. As we know, an error will be material if there is a realistic possibility that the decision that was in fact made could have been different if the error had not occurred. The Commission's error was material in this case. The Commission did not turn its mind to, or seek submissions about, whether any such conditions could have been imposed. Accordingly, there was a realistic possibility that, had the Commission done so, conditions to minimise Scope 3

127 *LPDT* (2024) 280 CLR 321 at 328-329 [14].

128 *LPDT* (2024) 280 CLR 321 at 329 [16]. See also *MZAPC* (2021) 273 CLR 506 at 539 [86].

129 LEC Act, s 25B(1).

emissions could have been imposed. That threshold of materiality being established, it was for MACH to establish that an approval without conditions concerning Scope 3 emissions was inevitable. It did not, and could not, do so.

196 It is not to the point that DAMSHEG did not propose conditions that could have minimised Scope 3 emissions. Nor should the preceding analysis be read so as to impose an obligation on the Commission to identify potential conditions that could have minimised Scope 3 emissions.¹³⁰ The statutory scheme established by the EPA Act placed responsibility on MACH, as the development proponent, to propose conditions to mitigate adverse environmental effects. The *Environmental Planning and Assessment Regulation 2000* (NSW) ("the EPA Regulations") required MACH's EIS to provide "a full description of the measures proposed to mitigate any adverse effects of the development ... on the environment".¹³¹ Pursuant to the EPA Regulations, the Planning Secretary imposed requirements for the EIS to include "an assessment of the likely greenhouse gas emissions of the development" and address measures to "avoid, minimise, mitigate and/or offset the likely impacts of the development" and "an assessment of ... whether these measures ... represent the full range of reasonable and feasible mitigation measures that could be implemented".¹³² DAMSHEG drew to the Commission's attention MACH's failure to propose conditions to minimise Scope 3 emissions.

197 The NSWCA was therefore wrong to suggest that DAMSHEG's "forensic choice" not to propose its own conditions to minimise Scope 3 emissions precluded it from alleging that the Commission fell into error. There was simply no obligation on DAMSHEG to propose such conditions.

198 The Commission's approach may be contrasted with that upheld by the NSWCA in *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc.*¹³³ In *KEPCO*, the Commission had refused an application for development consent to construct and operate a new thermal coal mine near Mudgee in NSW.¹³⁴ The Commission observed that KEPCO had only proposed conditions relating to Scope 1 and 2 emissions and stated that it was therefore of the view that KEPCO had "not minimised Scope 1, 2 and 3 [greenhouse gas] emissions to the greatest extent practicable as required under cl 14(1)(c) of

130 See generally *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission [No 2]* (2020) 247 LGERA 130 at 188-189 [84]-[85].

131 EPA Regulations, Sch 2, cl 7(1)(d)(iv). See also Sch 2, cl 7(1)(e).

132 EPA Regulations, Sch 2, cl 3(1), (5), (6).

133 (2021) 250 LGERA 39.

134 *KEPCO* (2021) 250 LGERA 39 at 44 [1].

the Mining SEPP".¹³⁵ As already noted, cl 14(1)(c) of the Mining SEPP was the predecessor to cl 2.20(1)(c) and was in relevantly the same terms.¹³⁶ The NSWCA upheld the Commission's decision, holding that the Commission appropriately "weighed in the balance against the grant of consent that [KEPCO] had proposed no condition which addressed the critical element, namely minimising the 98% of [greenhouse gas] emissions falling within Scope 3".¹³⁷

199 While it may be accepted that, as observed by the Commission in *Mullaley*, some aspects of Scope 3 emissions will be beyond the direct control of the development proponent, "conditions aimed at ensuring ... that [Scope 3] emissions [were] minimised to the greatest extent practicable" could have been considered to be imposed.¹³⁸ As Adamson JA observed in the NSWCA below:¹³⁹

"There was plainly much more that the Commission *could* have done by imposing conditions in relation to the 98% of emissions which would be generated by the [P]roject. It could, for example, as Ms Sharp SC, who appeared with Mr Thompson for Denman, submitted, have imposed conditions such as requiring the coal to be washed before it is exported; limiting the coal that is exported to coal of a certain high calorific content or that the coal be exported only to those countries which have NDCs under the Paris Agreement (or equivalent in the case of an entity such as Taiwan); requiring that coal exported from the [P]roject only be used in power stations which use technology such as carbon capture and storage or fluidised bed combustion; or requiring that MACH implement offsets to the emissions caused by the coal."

200 Such conditions may have been largely directed towards the minimisation of downstream Scope 3 emissions attributable to "third-party emissions from the combustion of product coal from the Project", although an offset condition

135 *KEPCO* (2021) 250 LGERA 39 at 48 [17], 54 [35].

136 See [172] above. See also *KEPCO* (2021) 250 LGERA 39 at 50 [21].

137 *KEPCO* (2021) 250 LGERA 39 at 55 [44]. See also 73 [127].

138 Resources SEPP, cl 2.20(1)(c).

139 See also NSW Independent Planning Commission, *Statement of Reasons for Decision: United Wambo Open Cut Coal Mine Project (SSD 7142) and Associated Modifications (DA 305-7-2003 MOD 16 & DA 177-8-2004 MOD 3)* (2019) at 60 [309]; Environment Protection Authority, *Greenhouse Gas Mitigation Guide for NSW Coal Mines* (March 2026) at 30-31; *Mullaley* (2021) 252 LGERA 221 at 248-249 [106].

might have been imposed in relation to all categories of Scope 3 emissions.¹⁴⁰ Whether the total permitted output of the mine could have been reduced or a condition could have been imposed on MACH selling the Project's coal only to countries that had undertaken to make significant reductions in their greenhouse gas emissions were not the subject of submission or argument. What can be stated is that although the Commission was required to consider issuing the consent "subject to conditions aimed at ensuring ... that greenhouse gas emissions are minimised to the greatest extent practicable", including Scope 3 emissions (both upstream and downstream) of the Project, it did not do so. By failing to turn its attention to this issue, the Commission also deprived itself of any opportunity to request further submissions about the availability or desirability of such conditions.¹⁴¹

201 The Commission's error in relation to s 4.15(1)(a)(i) of the EPA Act and cl 2.20(1)(c) of the Resources SEPP was therefore material and amounted to a jurisdictional error. The Commission's approval was invalid. The first ground of the amended notice of contention should be upheld.

Appropriate relief

202 As stated at the outset of these reasons, this Court cannot and does not address the merits of the requirement for the Commission to consider whether to impose conditions to minimise to the greatest extent practicable greenhouse gas emissions of the Project, including Scope 3 emissions, and what conditions, if any, might be imposed. It was for the Commission to consider whether to impose conditions to minimise to the greatest extent practicable greenhouse gas emissions of the Project, including Scope 3 emissions.

203 The NSWCA ordered that the matter be remitted to the Land and Environment Court of NSW. On remitter, it will be for that Court to consider making orders under Div 3 of Pt 3 of the LEC Act.

140 See [95]-[96] above. See also NSW Independent Planning Commission, *Statement of Reasons for Decision: United Wambo Open Cut Coal Mine Project (SSD 7142) and Associated Modifications (DA 305-7-2003 MOD 16 & DA 177-8-2004 MOD 3)* (2019) at 57-61 [297]-[313].

141 Cf *Mullaley* (2021) 252 LGERA 221 at 234-235 [37]. See also NSW Independent Planning Commission, *Statement of Reasons for Decision: United Wambo Open Cut Coal Mine Project (SSD 7142) and Associated Modifications (DA 305-7-2003 MOD 16 & DA 177-8-2004 MOD 3)* (2019) at 17 [72], 59-61 [306]-[309].

Third issue – climate change an environmental impact in the locality of the development

204 By Ground 3 of the appeal, MACH contended that the NSWCA erred in characterising climate change as an environmental impact of the development in the locality. Essentially, this is because MACH contended it is not possible to establish a causal link between Scope 3 emissions of the Project and the specific effects of climate change in the locality.

205 Given the conclusions reached above, it is neither necessary nor appropriate to address this issue. It is therefore also unnecessary to decide whether special leave to appeal should be revoked in relation to this ground, as contended for by DAMSHEG. There is, however, considerable force in the submissions of DAMSHEG and the Union of Concerned Scientists, appearing as amicus curiae, that it would not have been appropriate for this Court to decide the issue given that the issue was not raised in the courts below and where scientific evidence might have been adduced to rebut the claims now raised by MACH.

Conclusion and orders

206 For those reasons, leave is granted to DAMSHEG to amend its notice of contention to include Ground 2, but that ground should be dismissed. The appeal should be dismissed with costs.

EDELMAN J.

Introduction: the three questions and the answers*The three questions*

207 On 6 September 2022, the Independent Planning Commission of New South Wales ("the Commission") granted development consent to the Mount Pleasant Optimisation Project in the locality of the Upper Hunter Valley. That consent extended the life by 22 years, and will expand the operations, of an open cut coal mine that is owned and operated by the appellant, "MACH". The consent will permit an additional 406 million tonnes of coal to be extracted. Although a small amount of that coal will be sold on the domestic market, most of the coal will be exported. An expert, Professor Sackett, estimated that the project will be one of the 650 largest greenhouse gas emitting projects or collective human activities in the world over industries including energy, transport, agriculture, and urban development.

208 Greenhouse gas emissions are commonly described, consistently with a goal of developing "internationally accepted [greenhouse gas] accounting and reporting standards for business", using categories labelled "scope 1", "scope 2", and "scope 3".¹⁴² Almost all of the project's greenhouse gas emissions (860 out of 876.07 million tonnes) will be scope 3 emissions, including upstream emissions in the process of supply of materials to the project and downstream emissions in the burning of coal by users, generally in the export markets where the coal will be sold.

209 A precondition for development consent was that the Commission "take into consideration", as relevant to the development, whether to impose conditions "to ensure ... that greenhouse gas emissions are minimised to the greatest extent practicable".¹⁴³ That required the Commission to consider conditions to minimise *all* greenhouse gas emissions to the greatest extent practicable. The Commission provided detailed reasons for imposing conditions to minimise scope 1 and scope 2 emissions. Those emissions will amount to two per cent of the project's greenhouse gas emissions. But the Commission imposed no conditions to minimise scope 3 emissions, which will amount to 98 per cent of the project's greenhouse gas emissions. Instead, the Commission repeatedly said that scope 3 emissions were not counted towards the emissions reported by New South Wales, but rather would

142 *R (on the application of Finch) v Surrey County Council* [2024] 4 All ER 717 at 729 [39]-[40].

143 *State Environmental Planning Policy (Resources and Energy) 2021* (NSW), cl 2.20(1)(c) read with *Environmental Planning and Assessment Act 1979* (NSW), ss 4.15(1)(a)(i) and 4.40.

be counted in the emissions of the countries to which the coal was exported for consumption.

210 The meaning of a further precondition for development consent was the subject of considerable argument in this Court. That precondition, with grammatical interpolation, required the Commission to "take into consideration", as relevant to the development, "the likely impacts of that development, including [(i)] environmental impacts on both the natural and built environments, and [(ii)] social and economic impacts in the locality".¹⁴⁴

211 The first respondent to this appeal, an environmental organisation described at first instance by the acronym "DAMSHEG", unsuccessfully sought judicial review in the Land and Environment Court of New South Wales. But the Court of Appeal of the Supreme Court of New South Wales allowed an appeal by DAMSHEG and made a declaration that, subject to matters arising on remittal to the Land and Environment Court, the development consent was invalid. Three questions arise on the further appeal by MACH to this Court.

212 The first question on this appeal is whether the Commission failed to consider whether conditions should be imposed to ensure that greenhouse gas emissions *of all scopes* are minimised to the greatest extent practicable. As DAMSHEG pointed out before the Court of Appeal, the Court of Appeal had previously upheld the decision of a differently constituted Commission to refuse development consent for a proposal for a mine in the Bylong Valley where the proposal contained no measures to minimise scope 3 emissions.¹⁴⁵

213 A second question on this appeal concerns whether the further precondition for development consent described above¹⁴⁶ should be interpreted, contrary to the grammatical interpolation in the expression of the duty, to require the Commission instead to consider the "environmental impacts ... in the locality". The answer to the second question raises a related issue of application, which DAMSHEG sought leave to raise by an amended notice of contention. The issue in the amended notice of contention, for which leave to file should be granted, concerns whether the Commission failed to engage in the required consideration.

214 A third question, which arises if the Commission was required and did fail to consider the "environmental impacts ... in the locality", is whether the greenhouse gas emissions from the project could have a global warming impact in

144 *Environmental Planning and Assessment Act*, ss 4.15(1)(b) and 4.40.

145 *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* (2021) 250 LGERA 39 at 73 [127].

146 At [210].

the locality. This issue arises because despite the scope 3 emissions being 98 per cent of the project's emissions, and despite the large size of the project, the scope 3 emissions are only 0.065 per cent of total annual anthropogenic global emissions.¹⁴⁷ Although purporting to deny that it sought a "but for" causal test (ie showing that the project was necessary for a different global warming impact in the locality), MACH effectively supported such a test by a new argument which asserted that DAMSHEG was required to show that "any one source of emissions may be causative of climate change impacts in a particular locality".¹⁴⁸ There are considerable difficulties with MACH raising this argument in this Court.¹⁴⁹ If MACH's new argument had been raised at trial, scientific evidence concerning source and event attribution could have been given.¹⁵⁰

The answers

215 As to the first question, the requirement of consideration was that the Commission express in the reasons given for the decision its consideration of minimisation conditions. The members of the Commission carefully expressed their consideration of the minimisation conditions in relation to scope 1 and scope 2 emissions, amounting to two per cent of the project's emissions. But the members of the Commission did not address that requirement with respect to scope 3 emissions, amounting to 98 per cent of the project's emissions, because they considered that those emissions would be accounted for in the countries to which the coal was exported. By focusing only upon two per cent of the project's emissions, the Commission failed in its reasons to consider whether conditions should be imposed to ensure that greenhouse gas emissions are minimised to the greatest extent practicable.

216 The answer to the second question on this appeal is that the relevant consideration required to be expressed by the Commission in its reasons was of the likely environmental impacts of the project on both the natural and built environments. The Commission considered the contribution of the project to greenhouse gas emissions and the potential impacts of greenhouse gas emissions on the environment generally. The Commission also expressed its consideration of

147 Measured in 2017 and excluding land use change.

148 Citing *Lliuya v RWE AG*, Oberlandesgericht Hamm (Hamm Higher Regional Court), I-5 U 15/17, 28 May 2025; *Native Village of Kivalina v ExxonMobil Corp* (2009) 663 F Supp 2d 863 at 880 (affirmed (2012) 696 F 3d 849).

149 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

150 Phillips, Merner and Otto, "Attribution Science", in Wewerinke-Singh and Mead (eds), *The Cambridge Handbook on Climate Litigation* (2025) 79 at 80-83, 87, 101.

the impacts of greenhouse gas emissions in the locality, which were not impacts which were unique to that locality. That expressed consideration was sufficient.

217 The third question therefore does not arise and can be put aside for the remainder of these reasons. Issues of scope of duty and causation would arise only if the Commission had failed to consider the contributions of the project to likely environmental impacts on both the natural and built environments of greenhouse gases. The issue, which is one of scope of duty and causation, would then be whether those contributions would be matters that have likely environmental impacts on natural and built environments. It suffices to say that, since questions of scope of a statutory duty and related questions of causation will depend upon the interpretation of the statutory provision,¹⁵¹ and since the relevant provision requires a wide range of matters to be considered by the Commission,¹⁵² there is a strong argument that matters that have a "likely impact" on natural and built environments should be broadly interpreted to include matters that make non-trivial contributions to a process that has such an impact.¹⁵³ In other words, it would be necessary to consider any non-trivial contribution to greenhouse gases where those gases have impacts on climate change in the natural and built environments generally or upon the natural and built environments in the specific locality of the project.

Background and the way these questions arise

218 The background and legislative provisions are set out in detail in the other reasons for decision in this Court. Under the *Environmental Planning and Assessment Act 1979* (NSW), the Commission is an incorporated New South Wales Government agency which is the "consent authority" for State significant development.¹⁵⁴ The Commission consists of a number of members with a range of expertise.¹⁵⁵ For a State significant development project like the Mount Pleasant Optimisation Project which can be carried out with development consent,¹⁵⁶ the

151 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 31-32.

152 *Environmental Planning and Assessment Act*, s 4.15(1)(b).

153 See Geistfeld and Steel, "Causation in Tort", in Kysar and Lim (eds), *The Oxford Handbook of Climate Change and Private Law* (2026) 119.

154 *Environmental Planning and Assessment Act*, ss 2.7(1), 2.7(3), 4.5(a).

155 *Environmental Planning and Assessment Act*, s 2.8.

156 *Environmental Planning and Assessment Act*, ss 4.9(a), 4.38.

process before evaluation requires an application for consent¹⁵⁷ and any required consultation and obtaining of concurrences by the Commission.¹⁵⁸

219 The first two questions arise from s 4.15 of the *Environmental Planning and Assessment Act*, concerning matters "as are of relevance" that a consent authority, here the Commission, is required "to take into consideration" in evaluating a development application.¹⁵⁹ The first question arises from the first ground of DAMSHEG's amended notice of contention, which challenges the reasoning of the Court of Appeal in this respect. That question is treated as the first question in these reasons because it involves the most detailed requirement for consideration by the Commission, arising from the reference in s 4.15(1)(a)(i) to "any environmental planning instrument", and the requirement by reason of that provision to consider "conditions to ensure ... that greenhouse gas emissions are minimised to the greatest extent practicable".¹⁶⁰ The Court of Appeal held that the Commission had complied with this requirement for consideration. In broad terms, the Court of Appeal inferred from the Commission's awareness of the requirement, together with the Commission's reference to scope 3 emissions being regulated and accounted for elsewhere, that the Commission had "considered there to be no need for the imposition of minimisation conditions in relation to the Scope 3 emissions".¹⁶¹

220 The second question arises from MACH's grounds of appeal and DAMSHEG's second ground of contention. That question concerns the more general requirement in s 4.15(1)(b) for the Commission to consider "the likely impacts of [the] development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality". The Court of Appeal held, in the words of Ward P, that the "essential matter" in s 4.15(1)(b) was "the impacts of the proposed development on the locality of the development" and that by focusing upon the global environmental impacts of the

157 *Environmental Planning and Assessment Act*, s 4.12.

158 *Environmental Planning and Assessment Act*, ss 4.13(1), 4.13(2A).

159 *Environmental Planning and Assessment Act*, s 4.15(1) with s 4.40.

160 *State Environmental Planning Policy (Resources and Energy)*, cl 2.20(1)(c).

161 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 286 [81], 321 [245]. See also 318 [229].

proposed development, the Commission failed to consider the environmental impacts "in the locality".¹⁶²

221 The answers to both questions depend upon contestable issues of interpretation of the reasons of the Commission. For the reasons below, I reach a different conclusion from the Court of Appeal on both questions. The first question should be answered in favour of DAMSHEG and the second question should be answered in favour of MACH.

What is required for the Commission to "take [a matter] into consideration" as "of relevance"?

222 An issue underlying both the first and second questions is the content of the duty in s 4.15(1) to "take into consideration" specified matters "as are of relevance". This is a familiar statutory duty, with similar content to a duty to take relevant matters "into account" and which is analogous to a duty to be "satisfied" of the existence of relevant matters. Unless expressed in terms that are expressly or impliedly concerned with the decision maker's subjective (reasonable) opinion as to relevancy, the relevancy of a matter is ultimately for the court to decide based on the circumstances;¹⁶³ a consideration can be relevant for one purpose and irrelevant for another.¹⁶⁴ But where the relevant matter is one that must be taken into consideration, or into account, there is an issue of statutory interpretation that is commonly neglected. That issue is whether the duty is: (i) to *apply* the matter in reasons given; (ii) to *manifest* consideration of the matter in reasons given; or (iii) to give *subjective* consideration to the matter.¹⁶⁵

162 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 291 [108]-[109]. See also 320 [237]-[238], 321 [245].

163 *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at 718 [50]-[51]; *Ross v Lane* (2022) 255 LGERA 136 at 149-150 [40]. Cf *Ross v Lane* (2022) 255 LGERA 136 at 140 [1], 165 [102]-[103]; *El Khouri v Gemaveld Pty Ltd* (2023) 256 LGERA 24 at 40 [53]; *Bingman Catchment Landcare Group Inc v Bowdens Silver Pty Ltd* (2024) 260 LGERA 297 at 319 [100]-[101].

164 *Duffy v Da Rin* (2014) 87 NSWLR 495 at 508 [53]. See also Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 7th ed (2022) at 281 [6.80].

165 See *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* [2026] HCA 23 at [111].

223 The duty in s 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act*—to "take into consideration" the provisions of any environmental planning instrument that is relevant—is a duty in sense (i), to apply that instrument in reasons given.¹⁶⁶ But the provision of the instrument to be applied, cl 2.20 of the *State Environmental Planning Policy (Resources and Energy) 2021* (NSW)—requiring the Commission to "consider whether or not the consent should be issued subject to conditions ... to ensure ... that greenhouse gas emissions are minimised to the greatest extent practicable"—concerns a duty in either sense (ii) or (iii). So too, the duty in s 4.15(1)(b) of the *Environmental Planning and Assessment Act* to "take into consideration" various "likely impacts of [the] development" is a duty in either sense (ii) or (iii). The issue is which of the senses, (ii) or (iii), is engaged by these requirements of consideration.

224 When determining if one of the duties above has been breached, the difference between sense (ii)—a duty to manifest consideration of a matter in reasons—and sense (iii)—a duty to give subjective consideration to a matter—is a difference between interpretation of reasons and inference of a state of mind based upon any reasons given and any other relevant conduct of the decision maker, including even direct evidence. Nevertheless, in both instances it is necessary to discern or infer "an active intellectual process".¹⁶⁷ And in both instances, "the fact that a decision-maker says they have had regard to a representation does not by itself establish that they have, as a matter of substance, had that regard".¹⁶⁸

225 The consent authority which is the subject of the duty to consider in s 4.15(1)(b) of the *Environmental Planning and Assessment Act* and cl 2.20 of the *State Environmental Planning Policy (Resources and Energy)* has an express duty to give reasons for its decision concerning a development application for State significant development. The duty is one to provide "reasons for the decision (having regard to any statutory requirements applying to the decision)".¹⁶⁹ The "regard" for statutory requirements applying to the decision is a regard that is expressed in the reasons for decision. So too, the duties of consideration in s 4.15(1)(b) of the *Environmental Planning and Assessment Act* and cl 2.20 of the *State Environmental Planning Policy (Resources and Energy)* are duties to

166 Basten, "Judicial Review: Can We Abandon Grounds?" (2018) 93 *AIAL Forum* 22 at 25; Kennett, "Duties to Consider" (2019) 26 *Australian Journal of Administrative Law* 60 at 64-65.

167 *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177 at 189 [12], 212-213 [77].

168 *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643 at 654 [45].

169 *Environmental Planning and Assessment Act*, Sch 1, cl 20(2)(c).

manifest in the required reasons an intellectual engagement with the relevant matter. It would be incongruous, on the one hand, to have a duty to provide "reasons for the decision (having regard to any statutory requirements applying to the decision)", yet, on the other hand, for a duty concerning particular considerations to be a purely subjective duty for members of the Commission which might not be contained in their reasons. Nevertheless, the distinction in this case between a duty of subjective consideration and a duty to manifest consideration in reasons is one which could make no difference to the result of the appeal because there was no evidence, either directly from the members of the Commission or otherwise, that the members of the Commission had engaged in some subjective consideration that was not expressed in the reasons that they were required to give.

Question 1: Did the Commission consider conditions to ensure scope 3 emissions are minimised to the greatest extent practicable?

The need to consider conditions on scope 3 emissions, both downstream and upstream

226

The obligation in cl 2.20(1)(c) of the *State Environmental Planning Policy (Resources and Energy)* for the Commission to consider conditions to ensure that all greenhouse gas emissions "are minimised to the greatest extent practicable" replicated the terms of cl 14(1)(c) of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW). That predecessor provision, building on judicial developments,¹⁷⁰ had been introduced as part of the implementation of a policy "to ensure that indirect emissions from extractive industries are considered in the decision-making process".¹⁷¹ In 2019, a Bill was proposed to amend cl 14(2) to omit downstream emissions as an expressly required consideration.¹⁷² A Committee of the Legislative Council was critical of the Bill on grounds which included that it would "contradict well-established principles of New South Wales planning law" and that "[g]iven that the committee heard that emissions from mining projects are overwhelmingly from downstream

170 *Gray v Minister for Planning* (2006) 152 LGERA 258.

171 Preston, "The influence of climate change litigation on governments and the private sector" (2011) 2 *Climate Law* 485 at 495.

172 *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019* (NSW), Sch 2.

sources, it is imperative that any assessment of the impacts of such projects continue to include this form of emission".¹⁷³

227 Consistently with the provision's history, the reference to "greenhouse gas emissions" in cl 2.20(1)(c) of the *State Environmental Planning Policy (Resources and Energy)* includes scope 3 emissions.¹⁷⁴ Although cl 2.20(1)(c) does not specifically refer to either downstream or upstream emissions, cl 2.20(2) makes clear that, "[w]ithout limiting [cl 2.20(1)]", the required consideration includes "an assessment of the greenhouse gas emissions (including downstream emissions)". The same must be true of upstream emissions.

228 The inclusion of emissions of all scopes, and both downstream and upstream emissions, in cl 2.20(1)(c) requires that the Commission's reasons make manifest an active intellectual process which engages with the possibility of conditions upon all scopes of greenhouse gas emissions, including downstream and upstream emissions, to ensure that all those emissions "are minimised to the greatest extent practicable". The manifestation of an active intellectual process which engaged only with the possibility of conditions upon two per cent of those emissions is not the consideration required by cl 2.20(1)(c).

The Commission's consideration of scope 3 emissions

229 In its reasons for decision, the Commission defined scope 1, 2, and 3 emissions 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 [greenhouse gas] 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."

173 New South Wales, Legislative Council, Portfolio Committee No 7 – Planning and Environment, *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 [Provisions]*, Report No 1 (2020) at 30 [2.102].

174 *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* (2021) 252 LGERA 221 at 246-247 [97]-[101].

230 The Commission's consideration of conditions for scope 1 and scope 2 emissions "to ensure ... that greenhouse gas emissions are minimised to the greatest extent practicable" was comprehensive. For the two per cent or 16.07 million tonnes of scope 1 and scope 2 emissions, numerous conditions were imposed: for instance, condition B36 (limiting scope 1 and scope 2 emissions), condition B32 (preparation of an Air Quality and Greenhouse Gas Management Plan), and condition B31 (including requirements to take all reasonable steps to improve energy efficiency). Yet for the other 98 per cent, or 860 million tonnes, of greenhouse gas emissions in scope 3, no conditions were imposed or even discussed.

231 The highest point of MACH's submission that the Commission had manifested any consideration of whether there were conditions that should be imposed to ensure that scope 3 emissions are minimised to the greatest extent practicable is the Commission's recital of the requirement in cl 2.20(1)(c) and the sentence of the Commission's reasons that reads:

"the Commission has considered all emissions associated with the Project (including Scope 3 emissions) in its assessment and determination".

232 But that sentence must be read in context, particularly by reference to the sentence immediately preceding it:

"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."

In other words, the Commission's "consideration" of scope 3 emissions had been on the basis that they need not be addressed by minimisation conditions because scope 3 emissions were not included in the project's emission reporting.

233 In any event, it is not clear what the Commission meant by its reference to having considered all emissions "in its assessment and determination". Does the statement mean that the Commission considered conditions to ensure that all emissions are minimised to the greatest extent practicable? Or does the statement mean that the Commission considered all emissions in its assessment and determination and concluded that it only needed to consider minimisation conditions in relation to scope 1 and scope 2 emissions?

234 The only open interpretation of the Commission's reasons is that the Commission did not impose any conditions concerning scope 3 emissions because it considered that it only needed to consider minimisation conditions in relation to scope 1 and scope 2 emissions, since scope 3 emissions would not be counted towards the emissions reported by New South Wales or Australia but rather would

be counted in the emissions of the countries to which the coal was exported for consumption. For instance, the Commission said:

"The Commission notes that the Project's Scope 3 emissions will be accounted for in the consumer countries' [greenhouse gas] emissions."

And again:

"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)."

And again:

"Some submissions recognised that while Scope 3 emissions are not counted towards NSW emissions, the cumulative impact of [greenhouse gas] emissions is still felt globally ... 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."

235 Not only is this interpretation supported by the Commission's repeated statements, but in the section of MACH's Environmental Impact Statement where the potential impacts of greenhouse gases on the environment were addressed, MACH had addressed scope 3 emissions by saying that scope 3 emissions "from the use of Project coal in overseas customer countries would be managed in accordance with customer countries['] commitments under the *Paris Agreement* ... and would not contribute to Australian greenhouse gas emissions or factor into Australian greenhouse gas reduction targets". That section was then followed by a section concerning mitigation measures that addressed only scope 1 and scope 2 emissions. As MACH later explained, "[t]he greenhouse gas emissions associated with the combustion of Project product coal will be primarily addressed and regulated by the Expected Export Countries, under their [Nationally Determined Contributions]".

236 This interpretation of the Commission's reasons is therefore founded on the very reasoning that had been urged by MACH. The onus had been borne by MACH to propose mitigation measures in its Environmental Impact Statement,¹⁷⁵ and the Commission was responding to that onus consistently with the reasoning urged by MACH.

¹⁷⁵ *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 2, cl 6(e), 7(1)(d)(iv).

237 Even more fundamentally, the near-impossibility of interpreting the absence of any minimisation conditions with respect to scope 3 emissions as a considered rejection of any minimisation conditions is reinforced by the fact that no party before this Court denied that there were simple conditions that could have been imposed to minimise scope 3 emissions, as had occurred in other cases.¹⁷⁶ As Adamson JA said in the Court of Appeal:¹⁷⁷

"[The Commission could] have imposed conditions such as requiring the coal to be washed before it is exported; limiting the coal that is exported to coal of a certain high calorific content or that the coal be exported only to those countries which have [Nationally Determined Contributions] under the Paris Agreement (or equivalent in the case of an entity such as Taiwan); requiring that coal exported from the project only be used in power stations which use technology such as carbon capture and storage or fluidised bed combustion; or requiring that MACH implement offsets to the emissions caused by the coal."

The Commission did not say that any of these possible conditions had been considered. And even if all of these possible conditions had not occurred to the Commission, the Commission did not even say, as it had in other cases, that no conditions were imposed concerning scope 3 emissions because scope 3 emissions were outside of MACH's control¹⁷⁸ or because no conditions had been suggested by the parties.

238 Finally, as explained later in these reasons, the Commission's reasons reveal that the Commission was acutely conscious of the impacts of climate change both generally and in the locality. With all of those impacts as detailed by the Commission, it would be extremely curious for the Commission to have focused only upon conditions concerning two per cent of the emissions and not even to have mentioned the possibility of any conditions to minimise 98 per cent of the emissions. In this context, the obvious interpretation of the Commission's reasons

176 See, for instance, New South Wales Government, Independent Planning Commission, *Statement of reasons for decision: United Wambo Open Cut Coal Mine Project (SSD 7142) and associated Modifications (DA 305-7-2003 MOD 16 & DA 177-8-2004 MOD 3)* (2019) at 61 [311]-[312]; *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* (2021) 252 LGERA 221 at 249 [107]. See also Basten, "The Public Interest" (2024) 40 *Environmental and Planning Law Journal* 201 at 208.

177 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 319 [231].

178 For example, *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* (2021) 252 LGERA 221 at 243 [83].

is that the Commission treated it as unnecessary to consider scope 3 emissions because they would be counted in the emissions of the countries to which the coal was exported for consumption.

239 The natural and irresistible interpretation of the Commission's reasons is that the Commission was distracted by the accounting concepts of the scopes into which greenhouse gas emissions are divided. That distraction meant that the Commission treated it as unnecessary to consider in its reasons conditions to ensure that scope 3 greenhouse gas emissions are minimised to the greatest extent practicable. That was an error because cl 2.20(1)(c) of the *State Environmental Planning Policy (Resources and Energy)* does not exclude from the ambit of minimisation conditions those emissions that might be accounted for, or even regulated, by other countries. The Commission therefore did not comply with its duty to consider in its reasons whether to impose conditions to ensure that greenhouse gas emissions are minimised to the greatest extent practicable by considering only whether two per cent of the project's greenhouse gas emissions are minimised to the greatest extent practicable.

240 MACH did not deny that such a failure to consider was material in the sense that consideration could have affected the reasoning process of the Commission. Nor did MACH seek to establish that such a failure to consider was immaterial in the sense that the outcome was inevitable. As to the materiality upon which an applicant bears an onus, there could not have been any dispute that such a failure to consider involved "practical injustice" in the sense that the reasoning of the Commission to a conclusion could have been different had consideration been given.¹⁷⁹ That threshold is built into a ground of judicial review concerned with mandatory relevant considerations.¹⁸⁰ And, relevantly to the materiality onus borne by a respondent to a judicial review application once this threshold is established,¹⁸¹ MACH did not, and could not, establish that development consent being granted without conditions concerning scope 3 emissions was inevitable.

241 The first question should therefore be answered in favour of DAMSHEG. The first ground of DAMSHEG's amended notice of contention should be upheld on this point, and the appeal dismissed. It is convenient, nevertheless, to focus

179 *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 123-124 [95]; *MDP v The King* (2025) 99 ALJR 969 at 985-986 [61]-[62]; 423 ALR 204 at 221.

180 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 563 [159].

181 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 335 [36].

upon the part of MACH's appeal which concerns the Commission's consideration of environmental impacts more broadly.

Question 2: Did the Commission "take into consideration" the "likely ... environmental impacts on both the natural and built environments"?

242 The second question involves an issue of interpretation and an issue of application. The issue of interpretation concerns the essential meaning of s 4.15(1)(b) of the *Environmental Planning and Assessment Act*. The issue of application concerns whether the Commission correctly applied that essential meaning.

The interpretation issue

243 Section 4.15(1)(b) of the *Environmental Planning and Assessment Act*, which applies to the determination of a development application in respect of State significant development,¹⁸² required the Commission to "take into consideration":

"the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality".

244 MACH submitted that the proper interpretation of this provision, relevantly to this appeal, was as follows, with the additional numbering to illustrate the interpretation:

"the likely impacts of that development, including [(i)] environmental impacts on both the natural and built environments, and [(ii)] social and economic impacts in the locality".

245 DAMSHEG, supporting the approach of the Court of Appeal,¹⁸³ submitted that the proper interpretation of this provision was as follows, with the additional parentheses to illustrate the interpretation:

"the likely impacts of that development, [(I] including environmental impacts on both the natural and built environments, and social and economic impacts [I] in the locality".

¹⁸² *Environmental Planning and Assessment Act*, s 4.40.

¹⁸³ *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 320 [236], 321 [245].

246 The difference between the interpretations is that the essential meaning (the "hinge"¹⁸⁴ or "central focus"¹⁸⁵) arising from MACH's interpretation is the likely impacts of the development, whilst the essential meaning (also described by Ward P in the Court of Appeal as the "essential matter"¹⁸⁶) arising from DAMSHEG's interpretation is the likely impacts of the development *in the locality*.

247 As the added parentheses make clear, DAMSHEG's interpretation is ungrammatical. To make grammatical sense, the comma after "environments" would need to be moved to be placed immediately before "in the locality". But that is only a marginal consideration; rules of grammar, like dictionary definitions of words, "don't determine anything".¹⁸⁷ The interpretation of legislation proceeds by reference to the construct of the intention of a legislature,¹⁸⁸ for which rules of grammar, with expected care in legislative drafting, are only a guide. Since legislation speaks in the language of ordinary communication, and since meaning in ordinary communication is grounded by intention,¹⁸⁹ "meaning" in the interpretation of legislation is really shorthand for intended meaning. More accurately, since intended meaning must be set at the right level of generality, the concept is one of intended essential meaning. The intended essential meaning of s 4.15(1)(b), which is consistent with its grammatical structure, can be seen from the provision's history.

248 The predecessor provisions to s 4.15(1)(b) included s 90(1)(b) and s 90(1)(d) of the *Environmental Planning and Assessment Act*. Relevant parts of those provisions required a consent authority in determining a development application to take into consideration "the impact of that development on the environment" and "the social effect and the economic effect of that development in the locality". The consideration concerning the impact of the development on the environment contrasted with many other provisions, including that concerning

184 *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 282-283 [22]; *Insight Vacations Pty Ltd v Young* (2011) 243 CLR 149 at 162 [36].

185 *BHP Group Ltd v Impiombato* (2022) 276 CLR 611 at 636-637 [59].

186 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 291 [109].

187 Fish, "Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law" (2008) 29 *Cardozo Law Review* 1109 at 1123.

188 *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 283 CLR 291 at 328 [115]; *Palmanova Pty Ltd v The Commonwealth* (2025) 99 ALJR 1362 at 1376 [75]; 424 ALR 768 at 785. See also *Zedra Trust Co (Jersey) Ltd v THG plc* [2026] 2 WLR 479 at 491 [27]; [2026] 3 All ER 459 at 468.

189 Searle, *Intentionality: An essay in the philosophy of mind* (1983) at 161.

the social effect and the economic effect of the development, which were limited to the locality. It was held that "the impact of that development on the environment" was not constrained by locality.¹⁹⁰

249 Those dual considerations were part of a long list of matters for consideration in s 90. Following a White Paper recommendation to rationalise the s 90 factors,¹⁹¹ a new s 79C was enacted¹⁹² which contained "a reduced and general list of considerations",¹⁹³ with s 79C(1) later renumbered as s 4.15(1).¹⁹⁴ That reduced list consolidated, without fundamentally altering, many of the s 90 factors, including, in s 79C(1)(b) (later renumbered as s 4.15(1)(b)), the previously distinct considerations of "the impact of that development on the environment" and "the social effect and the economic effect of that development in the locality". The meaning of the consideration in s 4.15(1)(b) was not relevantly changed from the interpretation given to s 90(1)(b).¹⁹⁵ As a general environmental consideration, it includes both the impact on the environment generally and, to the extent that there are unique environmental effects in the locality, the impact on the environment in the locality.

The application issue

250 The evidence before the Commission, including the Environmental Impact Statement prepared by MACH, concerning the effect of the project on the environment must be understood in two steps. First, there was evidence concerning the contribution of the project to greenhouse gas emissions. Secondly, there was evidence concerning the potential impacts of greenhouse gas emissions on the environment.

190 *Bell v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86 at 95.

191 New South Wales, Department of Urban Affairs and Planning, *Integrated Development Assessment: White Paper and Exposure Draft Bill, Environmental Planning and Assessment Amendment Bill 1997* (1997) at 18-19 [3.3.1]-[3.3.2].

192 *Environmental Planning and Assessment Amendment Act 1997* (NSW), s 3, Sch 1, item 32.

193 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 1997 at 828.

194 *Environmental Planning and Assessment Amendment Act 2017* (NSW), Sch 4.2, item 1.

195 See also *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107; *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177 at 209 [76].

251 These two steps are most clearly reflected in the Environmental Impact Statement. In the section concerning "Quantitative Assessment of Potential Greenhouse Gas Emissions" it was said, in terms later repeated, that "[t]he Project's contribution to climate change, including the associated environmental impacts, would be in proportion with its contribution to global greenhouse gas emissions". Then, after a section concerning mitigation measures, there was consideration of the "Potential Impacts of Climate Change on the Project". Although there was a dispute between the parties as to whether this subsequent discussion on the potential impacts of climate change concerned effects *of* the project or *on* the project, it must have been intended to concern both. The Environmental Impact Statement had previously explained that the project made a contribution to climate change and the section was then concerned with the impacts of climate change in the locality of the project and, therefore, on the project. As MACH said:

"It is acknowledged that (subject to the efficacy of national and international greenhouse gas abatement measures) all sources of greenhouse gas emissions will contribute in some way towards the potential global, national, state and regional effects of climate change."

252 As to the first step, the Environmental Impact Statement estimated that the project would generate CO₂-e emissions per year of approximately 33.1 million tonnes for scope 3 and 0.54 million tonnes for scope 1 and scope 2 combined. The estimated scope 3 emissions would represent approximately 0.065 per cent of global anthropogenic greenhouse gas emissions (excluding land use change) in 2017. To reiterate, the Environmental Impact Statement explained that the project's contribution to climate change, and "the associated environmental impacts, would be in proportion with its contribution to global greenhouse gas emissions".

253 As to the second step, concerning the potential impacts of greenhouse gas emissions (to which the project would contribute) on the environment, the evidence before the Commission concerned effects on the environment generally (globally, nationally, and for New South Wales) as well as on the environment in the specific locality of the project.

254 The effects on the environment generally were discussed in the most detail in an expert report from Professor Sackett which described current climate change impacts including accelerating sea-level rise, heatwaves, more extreme wildfires, hotter days and warmer nights, intensification of the hydrological cycle, and ocean acidification. The report also described possible climate change futures, which included impacts on the environment such as increases in the intensity of hot extremes including heatwaves, heavy precipitation, agricultural and ecological droughts, increased sea levels, and high extinction risks for endemic species.

255 There was also evidence of the particular effects of climate change in New South Wales and the locality of the Upper Hunter Valley. As Adamson JA said in the Court of Appeal:¹⁹⁶

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

256 In broad terms, and assuming for the purposes of MACH's grounds of appeal and DAMSHEG's second ground of contention that the contribution of the project to greenhouse gases was a contribution to (and effect on) climate change, the evidence concerning the environment generally and the environment in the locality of the project was evidence concerning the "likely ... environmental impacts on both the natural and built environments" within s 4.15(1)(b) of the *Environmental Planning and Assessment Act*. The Court of Appeal was correct that the Commission was required to consider this evidence. But, with respect, the Commission did so in its reasons; the Commission did not, in its reasons, neglect any consideration of environmental effects in the locality of the project.

257 The Commission explained that it had "carefully considered" the material, which included all of the information above and Appendix S to the Environmental Impact Statement concerning potential impacts of climate change at all levels (globally, nationally, for New South Wales, and for the locality of the project). And, consistently with the mitigation measures concerning these potential impacts recommended by MACH in the Environmental Impact Statement, the Commission adopted conditions related to those impacts concerning bushfire management and water management and storage.

258 As explained above, the Commission did not adopt any conditions concerning minimisation of scope 3 emissions; none had been recommended. As MACH said in Appendix S, "[a]ny small quantities of Project product coal sold on the domestic market ... would likely be substituting or augmenting supply from existing coal sources" and the scope 3 emissions would be accounted for under "Nationally Determined Contributions" under the Paris Agreement in the place to which the coal was sold. Although, in adopting the same approach, the Commission erred by failing to express consideration of whether to impose conditions "to ensure ... that greenhouse gas emissions are minimised to the

196 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 320 [237].

greatest extent practicable", the Commission nevertheless expressed consideration of all the environmental impacts of the project on the natural and built environments, including in the locality of the project.

259 For these reasons, this second question should be answered in favour of MACH.

Conclusion

260 I agree with Gordon J that the appeal should be dismissed with costs.

261 BEECH-JONES J. This is an appeal from a decision of the Court of Appeal of the Supreme Court of New South Wales¹⁹⁷ allowing the first respondent's appeal from a decision of the Land and Environment Court of New South Wales.¹⁹⁸ The Land and Environment Court dismissed judicial review proceedings brought by the first respondent, Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc ("DAMSHEG"), challenging the validity of a consent granted by the Independent Planning Commission of New South Wales ("the Commission") to a development application made by the appellant, MACH Energy Australia Pty Ltd ("MACH"). In allowing DAMSHEG's appeal, the Court of Appeal declared the consent "invalid for failure to consider a mandatory consideration".

262 The proposed development (or "Project") the subject of the development application is the extension of the operational life of the Mount Pleasant Coal Mine ("the mine") in the Upper Hunter Valley region of New South Wales for a period of 22 years until 2048. MACH is the operator of the mine.

263 As the other judgments make clear, the relevantly contentious aspect of the development application concerns the environmental effect of the so-called "scope 3" greenhouse gas emissions ("GHG emissions") generated by the Project. Those scope 3 GHG emissions are predominantly the GHG emissions generated by the consumption of the coal produced at the mine. The Project's "scope 1" GHG emissions are those generated as a direct result of the activity at the mine and its "scope 2" GHG emissions are those indirectly produced by energy consumed in undertaking that activity. The Project's scope 3 GHG emissions constitute 98 per cent of the total GHG emissions that it is anticipated will result from the Project. As the vast majority (if not all) of the coal produced by the mine is destined for export, those scope 3 GHG emissions would be generated in places outside of Australia.

264 Contentious as such matters may be, factual disputes over the effect of GHG emissions on the climate and the means of eliminating or reducing GHG emissions are not controversies for a court hearing an application for judicial review of the grant of a development consent to resolve. Thus, it is, and was, not the function of this Court, the Court of Appeal or the Land and Environment Court (in this case) to assess the environmental effects of any of the GHG emissions involved in or arising from MACH's mining and related activities, or to address the merits or otherwise of the Commission's decision to grant the consent. Instead, the function of this Court is, and of those courts was, to decide, by reference to the issues raised

197 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264.

198 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* [2024] NSWLEC 86.

by the parties, whether the consent was affected by jurisdictional error and should be declared invalid.

265 For the reasons set out below, which are similar to those of Gordon J but different to those of the Court of Appeal, I conclude that the consent was affected by jurisdictional error and should be declared invalid. In particular, DAMSHEG established that the Commission failed to consider a provision of an applicable environmental planning instrument, namely so much of cl 2.20(1) of the *State Environmental Planning Policy (Resources and Energy) 2021* (NSW) ("the Resources SEPP") as provided that, before granting consent, the Commission was obliged to consider whether to grant consent subject to conditions to ensure that all GHG emissions, including scope 3 GHG emissions, are minimised to the greatest extent practicable.¹⁹⁹ Accordingly, I would dismiss the appeal.

Background

266 The background, statutory scheme and issues in the appeal are set out in the judgment of Gageler CJ and Jagot J and in the judgment of Gordon J. It suffices to note the following.

267 MACH's proposed development was declared to be "State significant development"²⁰⁰ and, as such, the development application was regulated by Div 4.7 of the *Environmental Planning and Assessment Act 1979* (NSW) ("the EPA Act"). The Commission was the designated consent authority with respect to the development application.²⁰¹ The Commission was obliged to determine the application²⁰² by either "granting consent to the application with such modifications of the proposed development or on such conditions as the consent authority may determine" or "refusing consent to the application".²⁰³

268 MACH's development application, which included an Environmental Impact Statement ("EIS"),²⁰⁴ was referred to the Commission. The Minister for Planning and Public Spaces requested that the Commission conduct a public

199 Resources SEPP, cl 2.20(1)(c).

200 *Environmental Planning and Assessment Act 1979* (NSW), s 4.36(1).

201 EPA Act, s 4.5(a).

202 EPA Act, s 2.9(1)(a).

203 EPA Act, s 4.38(1).

204 As required by the EPA Act: s 4.12(8).

hearing into the development application and its determination.²⁰⁵ The Commission heard from members of the community and received written submissions and reports from various interested parties, including DAMSHEG and the NSW Department of Planning and Environment ("the Department"). Having conducted a public hearing, the Commission was obliged to produce a statement of its findings and recommendations.²⁰⁶ Separately, the Commission was subject to mandatory notification requirements that required it to provide "the reasons for the decision (having regard to any statutory requirements applying to the decision)".²⁰⁷ The Commission duly produced a statement of reasons for its decision to grant development consent subject to certain conditions. So much of those reasons as addressed the Project's scope 3 GHG emissions are addressed below.

269 Section 4.15(1) of the EPA Act applied to the determination of MACH's development application.²⁰⁸ It relevantly provides:

"In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application –

(a) the provisions of –

(i) any environmental planning instrument, ...

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts *in the locality*,

..." (emphasis added)

270 It was not in dispute between the parties that, for the purposes of s 4.15(1)(a)(i), the relevant environmental planning instrument that applied to the land to which MACH's development application relates was the Resources SEPP.

205 EPA Act, s 2.9(1)(d); Sch 2, cl 3(1)(a).

206 EPA Act, Sch 2, cl 6(1).

207 EPA Act, Sch 1, cl 20(2)(c).

208 Subject to the provisions of Div 4.7 of the EPA Act concerning State significant development.

MACH's appeal

271 In allowing DAMSHEG's appeal, the Court of Appeal held that, on its proper construction, either that part of s 4.15(1)(b) of the EPA Act which refers to "in the locality" is distributed across s 4.15(1)(b), or the words after the first comma in s 4.15(1)(b) (ie, after "that development,") are disjoined from the balance of the paragraph, so that the requirement to consider impacts in the locality is not an aspect of a broader obligation to consider the likely impacts of the development. On either of those constructions, the impact of the development on the environment *in the locality* is the central focus of the provision, with the apparent consequence that the Commission was required to consider the causal connection between the Project and its impact on the environment in its locality. The Court of Appeal found that, by only referring to the impacts of GHG emissions and climate change "felt globally, without reference to the specific impacts on the locality", the Commission failed to address s 4.15(1)(b) as so construed. This failure was found to constitute jurisdictional error warranting a declaration that the consent is invalid and an order that it be set aside.²⁰⁹

272 Pursuant to a grant of special leave to appeal, MACH challenges the Court of Appeal's conclusions. In its submissions in this Court MACH sought to cut across the Court of Appeal's reasoning by relying on a decision of a majority of the Court of Appeal in *Ross v Lane*²¹⁰ as authority for the proposition that the matters listed in s 4.15(1) of the EPA Act, including s 4.15(1)(a) and (b), are "evaluative" and that a failure by a consent authority to take them into account cannot give rise to jurisdictional error and does not lead to invalidity.

273 I reject that contention. I adhere to what I concluded in dissent on this point in *Ross v Lane*, namely that there is no scope for a consent authority not to take into account each of the considerations specified in s 4.15(1)(b) to (e) of the EPA Act, "although the facts found concerning those matters and the weight to be attached to them is a matter for the consent authority".²¹¹ The same applies to s 4.15(1)(a) save for the possible circumstance where the applicability of a particular environmental instrument to a particular development application "is

209 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 320 [238]; see *Craig v South Australia* (1995) 184 CLR 163 at 179.

210 (2022) 255 LGERA 136, and subsequent Court of Appeal decisions that have applied it: *El Khouri v Gemaveld Pty Ltd* (2023) 256 LGERA 24; *Bingman Catchment Landcare Group Inc v Bowdens Silver Pty Ltd* (2024) 260 LGERA 297.

211 *Ross v Lane* (2022) 255 LGERA 136 at 149 [40].

dependent on the formation of an opinion by the consent authority",²¹² in which case the formation of that opinion is itself a "jurisdictional fact".²¹³ Although the consent authority is not required to apply the relevant environmental planning instrument as though it were a binding statute, the requirement to "take into consideration" the provisions of such instruments, as referred to in the opening words of s 4.15(1), means the provisions must be "give[n] weight ... as a fundamental element in making" the relevant determination.²¹⁴ That obligation is further addressed below.

274 Otherwise, MACH raises three grounds of appeal challenging the Court of Appeal's conclusions, namely that the Court of Appeal erred in: (1) construing s 4.15(1)(b) of the EPA Act as requiring the consent authority to consider the built and natural environmental impacts of a development "in the locality"; (2) construing s 4.15(1)(b) of the EPA Act as requiring the consent authority to conduct a causal inquiry as to the impacts of climate change; and (3) finding that the impact of climate change is capable of being an environmental impact in the locality of the development within the meaning of s 4.15(1)(b) of the EPA Act.

275 At the hearing of the appeal, DAMSHEG sought leave to file an amended notice of contention raising an additional ground for supporting the Court of Appeal's orders, namely that, if the Court of Appeal erred in its construction of s 4.15(1)(b) of the EPA Act, the Court of Appeal nevertheless ought to have held that the development consent was invalid on the ground that the Commission "was required to consider the likely impacts of climate change in NSW and the Hunter Valley because of the evidence before the Commission including the material in the [EIS]".

276 For the reasons given by Gageler CJ and Jagot J, and the reasons given by Gordon J, I would uphold the first of MACH's grounds of appeal, grant leave to DAMSHEG to rely on an amended notice of contention, and reject the additional ground included in that notice.²¹⁵ I agree with their Honours that the Court of Appeal wrongly construed s 4.15(1)(b). Properly construed, that provision requires the consent authority to take into consideration the likely impacts of the development generally. Section 4.15(1)(b) is not to be construed so that the phrase

212 *Ross v Lane* (2022) 255 LGERA 136 at 149 [40].

213 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 179-180 [57]; see also *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 651 [131].

214 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329 ("*Sean Investments*"); see *Ross v Lane* (2022) 255 LGERA 136 at 149 [37].

215 Reasons of Gageler CJ and Jagot J at [32]-[42]; reasons of Gordon J at [150]-[163].

"in the locality" is distributed across the entirety of s 4.15(1)(b) or that the words after the first comma are disjoined from the balance of the paragraph. Depending on the consent authority's assessment, the likely impacts of the development may, and in many cases will, include impacts "in the locality" but that is neither the exclusive nor the central focus of s 4.15(1)(b).²¹⁶

277 In this case, as their Honours explain,²¹⁷ it was not demonstrated by DAMSHEG that the Commission failed to address what was required by s 4.15(1)(b) on the material before it. In light of that conclusion, neither ground 2 nor ground 3 of MACH's appeal arises for consideration or should be addressed. Accordingly, it is not necessary to address the submissions of the organisations that were granted leave to appear or make submissions as *amici curiae* on those issues.²¹⁸

Ground 1 of DAMSHEG's amended notice of contention: cl 2.20 of the Resources SEPP

278 There remains to consider the balance of DAMSHEG's amended notice of contention, which contends that the order of the Court of Appeal setting aside the consent should be upheld on the basis that "the Commission did not take into consideration, in the manner required by s.4.15(1)(a)(i) and cl 2.20 of the [Resources SEPP], whether development consent should be issued subject to conditions aimed at ensuring that greenhouse gas emissions (including downstream emissions) of the development are minimised to the greatest extent practicable".

279 It was common ground that neither MACH, the Department nor DAMSHEG suggested to the Commission that any conditions be imposed on the grant of development consent to address the Project's scope 3 GHG emissions or proposed any such conditions. As will be explained, the Commission imposed conditions on the grant of development consent to address the Project's scope 1 and 2 GHG emissions. It did not impose any conditions to address the Project's scope 3 GHG emissions and did not expressly address or refer to the possibility of imposing such conditions in its reasons.

216 Reasons of Gageler CJ and Jagot J at [32]-[40]; reasons of Gordon J at [150]-[152].

217 Reasons of Gageler CJ and Jagot J at [47], [49], [51]-[56]; reasons of Gordon J at [153]-[163].

218 The Union of Concerned Scientists; Melbourne Climate Futures; and the Centre for Climate Engagement at Hughes Hall, University of Cambridge and the Sabin Center for Climate Change Law at Columbia Law School.

280 The Court of Appeal rejected DAMSHEG's contention that the Commission failed to consider whether its consent to the development should be issued subject to conditions minimising scope 3 GHG emissions. The Court held that references by the Commission in its reasons to regulating scope 3 GHG emissions through international agreements, specifically the United Nations Framework Convention on Climate Change (UNFCCC) Paris Agreement 2015 ("the Paris Agreement"), meant that it could not be inferred that the Commission failed to consider whether conditions ought to be imposed on scope 3 GHG emissions. Ward P (with whom Price A-JA agreed) also concluded that "the consequence" of DAMSHEG's "apparent forensic decision" not to proffer potential conditions in its submission to the Commission meant that it could not "now complain about the Commission's ultimate conclusion that the Scope 3 emissions were regulated elsewhere" and that the conditions imposed on the consent to address scope 1 and 2 GHG emissions "were sufficient for the purposes of cl 2.20".

Failing to consider a mandatory matter or factor

281 As the party seeking to establish jurisdictional error in the form of a failure to consider a mandatory consideration, DAMSHEG bore the onus of proof.²¹⁹ In determining whether that onus has been discharged, any factual dispute regarding what reasoning process the decision maker in fact adopted is to be resolved "[l]ike other historical facts to be determined in other civil proceedings ... on the balance of probabilities by inferences drawn from the totality of the evidence".²²⁰ The absence of any reference to a matter or factor in a decision maker's reasons can support the drawing of an inference that the matter or factor was not considered or addressed by the decision maker but the drawing of such an inference is far from inevitable. All the materials that bear on the drawing of an inference must be considered.²²¹ So far as the reasons of a decision maker are concerned, they are to

219 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321 at 328 [10].

220 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 524 [38].

221 See *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families and Urban Housing as delegate of the Minister for the Environment* [2026] HCA 23 at [65].

be given a "beneficial construction"²²² with the avoidance of minute and fine scrutiny by "an eye keenly attuned to the perception of error".²²³

282 Having ascertained the decision maker's reasoning process, the question for the court in a case such as this is to determine whether the decision maker performed their statutory task of considering the relevant mandatory matter or factor or, more accurately, to determine whether it has been established that they did not. In some cases it may be that the relevant matter or factor was ignored or overlooked by the decision maker entirely.²²⁴ In other cases it may be that the decision maker considered or had regard to some matter or factor akin or related to the matter or factor required by the statute (or regulation or instrument) to be considered, but the court may find that, as a matter of construction, that matter or factor was not *the* matter or factor required to be considered by the statute (or regulation or instrument). Thus, for example, in *R v Hunt; Ex parte Sean Investments Pty Ltd*, in determining the applicable scale of fees in relation to a particular nursing home, the decision maker was obliged to "have regard to costs necessarily incurred in providing nursing home care in the nursing home".²²⁵ The decision maker failed to take that consideration into account because they proceeded on the incorrect understanding that the sole question was to consider whether a cost in the form of a rental increase was reasonably, as opposed to necessarily, incurred by the nursing home.²²⁶

283 In yet other cases, the decision maker may have adverted to the correct matter or factor but the court's findings with respect to the decision maker's reasoning process may establish that the decision maker did not satisfy a particular statutory requirement to "consider", "have regard to" or "take into account" the

222 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271, 278.

223 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287, cited in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

224 See, eg, *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at 448 [52]; *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109 at 127-128 [67]; *Minister for Families and Children v Certain Children (by their litigation guardian Sister Arthur)* (2016) 51 VR 597 at 621 [98]-[99].

225 *Sean Investments* (1979) 180 CLR 322 at 326.

226 *Sean Investments* (1979) 180 CLR 322 at 331-332.

matter or factor. While the content of such an obligation is statute dependent,²²⁷ there are various useful formulations of what is required to discharge such an obligation, one of which has already been referred to, being that stated by Mason J in *Sean Investments* concerning a statutory requirement to "have regard to" a factor. His Honour observed that the factor had to be "give[n] weight ... as a fundamental element in making" the relevant determination.²²⁸ To arguably similar effect, a statutory obligation to "have regard to" information provided by an applicant for a visa has been described as requiring the decision maker to engage in "an active intellectual process" directed at the information.²²⁹ Even so, in determining whether the decision maker discharged their statutory obligation, the court does not undertake merits review.²³⁰ Leaving aside consideration of whether the decision was unreasonable, the weight to be attributed to the matter or factor in issue is a matter for the decision maker to determine.²³¹

284 Navigating these waters is not straightforward. As Basten JA has observed, "the difficulty is to articulate a legal standard between a level of consideration which appears to be cursory or dismissive (and therefore inadequate) and a level of consideration which requires an assessment of the conclusions reached by the decision-maker (and is therefore beyond the role of the court)".²³² Ultimately, what level of engagement is required of the decision maker to discharge their obligation to "consider", "have regard to" or "take into account" a mandatory matter or factor will depend upon the "subject matter and purpose of the consideration" in a given statutory context,²³³ and the circumstances of the particular case.²³⁴

227 See, eg, *Origin Energy Electricity Ltd v Queensland Competition Authority* [2014] 1 Qd R 216 at 232 [86], 233 [90].

228 *Sean Investments* (1979) 180 CLR 322 at 329.

229 *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177 at 189 [12], 212-213 [77].

230 *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at 176-177 [34]-[36]; *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 599-600 [26].

231 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41.

232 *Bay Simmer Investments Pty Ltd v New South Wales* (2017) 222 LGERA 286 at 301-302 [56].

233 *Bay Simmer Investments Pty Ltd v New South Wales* (2017) 222 LGERA 286 at 302 [56].

234 See *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 599 [25].

Clause 2.20 of the Resources SEPP

285 The focus of the first ground of DAMSHEG's amended notice of contention is cl 2.20(1)(c) of the Resources SEPP. Clause 2.20 of the Resources SEPP provides:

"(1) Before granting consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, including *conditions to ensure* the following –

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

(2) Without limiting [cl 2.20(1)], in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider an assessment of the *greenhouse gas emissions (including downstream emissions)* of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions." (emphasis added)

286 Each of cl 2.20(1) and (2) of the Resources SEPP is a "provision" of an applicable environmental planning instrument for the purposes of s 4.15(1)(a)(i) of the EPA Act. Accepting that s 4.15(1)(a)(i) of the EPA Act does not oblige the consent authority to treat the Resources SEPP as a binding statute,²³⁵ the Commission was still obliged to consider each of cl 2.20(1) and (2). In this case the Commission endeavoured to apply the Resources SEPP. Section 4.15(1)(a)(i) of the EPA Act does not enable the Commission to consider and apply only *part* of a provision of an environmental planning instrument such as cl 2.20 (and the Commission did not purport to do so).

287 Sub-clauses (1) and (2) of cl 2.20 describe distinct obligations of the consent authority. Clause 2.20(2) refers to an obligation of the consent authority *in*

235 *Ross v Lane* (2022) 255 LGERA 136 at 149 [37].

determining a development application to "consider" an "assessment" of the development's GHG emissions, including "downstream" GHG emissions, which, at least in this case, correspond to scope 3 GHG emissions. That process of considering the assessment must be undertaken "having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions".

288 Clause 2.20(1) describes an obligation of the Commission, before *it grants consent* for development for the purposes of mining etc, namely to "consider whether ... the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner" including, relevantly, "conditions to ensure ... that greenhouse gas emissions are minimised to the greatest extent practicable". No doubt a consideration of the GHG emissions assessment as referred to in cl 2.20(2) facilitates the performance of the obligation referred to in cl 2.20(1)(c). Absent cl 2.20(2), acting in conformity with cl 2.20(1)(c) would be difficult without an assessment of the GHG emissions resulting or arising from the development. However, the obligations are distinct. Hence cl 2.20(2) is prefaced by the words "[w]ithout limiting [cl 2.20(1)]". Without more, performance of the obligation referred to in cl 2.20(2) does not involve performance of the obligation referred to in cl 2.20(1)(c).

289 It follows that the reference to "including downstream emissions" in cl 2.20(2) confirms that the reference to "greenhouse gas emissions" in cl 2.20(1)(c) must also include "downstream emissions" (ie, scope 3 GHG emissions). The scheme of cl 2.20 would be defective if, in determining a development application under cl 2.20(2), consideration was given to an assessment of all of a development's GHG emissions, including scope 3 GHG emissions, but the consent authority was only required to consider whether the consent should be issued subject to conditions to minimise scope 1 and 2 GHG emissions under cl 2.20(1)(c). Contrary to MACH's submissions, excluding scope 3 GHG emissions from any consideration of whether the consent should be issued subject to conditions to ensure that GHG emissions are minimised to the greatest extent practicable would involve a failure to comply with s 4.15(1)(a)(i).

290 Moreover, the composite nature of the obligation described by cl 2.20(1)(c) to "consider whether or not the consent should be issued subject to conditions ... to ensure ... that greenhouse gas emissions are minimised to the greatest extent practicable" must be borne in mind. As was the case with the flawed consideration in *Sean Investments* of whether the nursing home's increased rent was reasonably incurred as opposed to necessarily incurred,²³⁶ the obligation described by cl 2.20(1)(c) is not discharged simply by considering whether or not a consent should be issued subject to conditions in order to address or appropriately regulate scope 3 GHG emissions. The "active intellectual process" required to satisfy

236 *Sean Investments* (1979) 180 CLR 322 at 330-331.

s 4.15(1)(a)(i) insofar as it refers to cl 2.20(1)(c) is directed to considering whether the consent should be issued subject to conditions that have a sharper objective, namely to ensure that all GHG emissions, including scope 3 GHG emissions, are minimised to the greatest extent practicable.

The Commission's reasons and GHG emissions

291 The Commission's reasons are lengthy and purport to be comprehensive. Even so, there is no express reference in the Commission's reasons to the Commission having considered whether consent to the development should be issued subject to any conditions concerning scope 3 GHG emissions, much less to conditions to ensure that scope 3 GHG emissions are minimised to the greatest extent practicable. However, as stated, that absence is not determinative as to whether the inference sought by DAMSHEG, that the Commission did not discharge its obligation under s 4.15(1)(a)(i) of the EPA Act to consider cl 2.20(1)(c) of the Resources SEPP, should be drawn. Further analysis of the reasons in the context of the statutory scheme is required.

292 The Commission addressed GHG emissions in section 5.3 of its reasons. That section commences with a definition of scope 1, scope 2 and scope 3 GHG emissions and then provides a description of the policy and regulatory approaches to GHG emissions under the headings "International", "National" and "State". Under the heading "International", the Commission recited that Australia is a signatory to the Paris Agreement. The reasons also noted that the Project's scope 3 GHG emissions would be accounted for in the countries to which the coal produced by the mine will be exported and also "note[d]" 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".

293 Under the headings "National" and "State", the Commission described the responses to GHG emissions and climate change at a Commonwealth and State level. At the conclusion of the discussion under the heading "State", the Commission reproduced the terms of cl 2.20(1) and (2) but preceded them with the phrase "[i]n the NSW policy context". In so stating, the Commission appears to have treated cl 2.20 of the Resources SEPP itself as part of the "State policy" as referred to in cl 2.20(2) of the Resources SEPP.

294 The next part of section 5.3 of the Commission's reasons is entitled "5.3.1 Project GHG Emissions". The reasons describe the "Greenhouse Gas Assessment" which accompanied MACH's EIS (ie, the "assessment" referred to in cl 2.20(2)). The reasons record that the Department noted that 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". Under the subheading "Scope 1 and 2 Emissions" the Commission described the level of scope 1 and 2 emissions arising from the Project and the mitigation measures that MACH was proposing or at least considering for those forms of GHG emissions.

295 The Commission's reasons then state as follows:

"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.*" (emphasis added)

296 This discussion occurs in a part of the Commission's reasons that is at least principally, and perhaps solely, addressed to "considering" the GHG emissions assessment and the associated State and national (and international) policies concerning those emissions as part of the "determination" of the development application as required by cl 2.20(2) of the Resources SEPP.

297 The last part of section 5.3 of the Commission's reasons sets out the Commission's findings (relevantly) as follows:

"5.3.2 Commission's Findings

152. ...
153. The Commission recognises the concerns expressed in these submissions [about climate change, GHG emissions and their global effect], 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 [EPA 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 [New South Wales Climate Change Policy Framework], the [New South Wales] Net Zero Plan or Australia's current obligations under the Paris Agreement in respect of Australia's current [Nationally Determined Contributions].

155. The Commission notes there is a growing body of international, national and State policy that is aimed at reducing GHG emissions ..., particularly those associated with fugitive methane. The Commission is required to have regard to such applicable polic[i]es at the national and State level (under clause 2.20 of the Resource[s] SEPP)." (emphasis added)

298 Paragraph 153 of the Commission's reasons refers to scope 3 GHG emissions and restates the effect of the Paris Agreement. The reference to fugitive methane in paragraph 155 is to methane that escapes during coal mining operations, being a form of scope 1 GHG emissions. Paragraphs 154 and 155 refer to cl 2.20 and express findings about the estimate of scope 1 and scope 2 GHG emissions in the context of relevant State and national (and international) policies. These paragraphs are clearly addressing cl 2.20(2) of the Resources SEPP in the context of scope 1 and 2 GHG emissions.

299 Paragraphs 156 to 160 of the Commission's reasons then address whether various conditions should be attached to the consent addressing the Project's scope 1 and scope 2 GHG emissions. These paragraphs are clearly directed to the terms of cl 2.20(1)(c) but not in its application to scope 3 GHG emissions.

300 Section 5.3 of the Commission's reasons concludes as follows:

- "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 [EPA 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." (emphasis added)

301 In this Court, MACH submitted that the reference to "GHG emissions" in the first sentence of this paragraph is to scope 1, scope 2 and scope 3 GHG emissions. That may be so, but all that sentence states is that those emissions have

been "adequately assessed". Assessment is the topic addressed by cl 2.20(2) of the Resources SEPP, not by cl 2.20(1)(c).

302 MACH also noted that the Commission stated that the "Project can achieve the requirements of the Resources SEPP" and submitted that the Commission addressed cl 2.20(1)(c) at the requisite level of particularity. That conclusion only related, however, to a reduction of "fugitive emissions" by the imposition of conditions. As noted, the reference to "fugitive emissions" is to a form of scope 1 GHG emissions.

303 Under the heading "5.10 Economics", the Commission dealt with an economic assessment of the Project that included analysis of the costs of scope 1 and 2 GHG emissions to be apportioned to New South Wales. The only other reference to GHG emissions in the Commission's reasons is in the conclusion section, which relevantly states:

"The Commission has carefully considered the Material before it as set out in section 3.1 of this report. Based on its consideration of the Material, the Commission finds that the Project should be approved subject to stringent conditions of consent for the following reasons:

- ...
- *the GHG emissions for the Project have been adequately estimated and are permissible in the context of the current climate change policy framework;*
- opportunities exist for the Applicant throughout the life of the Project to deploy existing, emerging and future technologies to improve the abatement of GHG emissions;
- ..." (emphasis added)

304 Assuming that the reference to "GHG emissions" in the first of these points includes scope 3 GHG emissions, that statement is just another reference to a consideration of the assessment of GHG emissions as referred to in cl 2.20(2) of the Resources SEPP. The reference to "improv[ing] the abatement of GHG emissions" can only be a reference to the abatement of scope 1 and scope 2 GHG emissions as only those forms of emissions were sought to be abated by various initiatives proposed by MACH and the conditions imposed by the Commission. There was no proposal for the "abatement" of scope 3 GHG emissions.

DAMSHEG discharged its onus

305 DAMSHEG contended that the Court of Appeal erred in failing to draw an inference that, before granting consent, the Commission did not consider whether the consent should be issued subject to conditions to ensure that scope 3 GHG

emissions are minimised to the greatest extent practicable. DAMSHEG relied on the absence of any express reference in the Commission's reasons to the giving of consideration to whether such conditions should be imposed in the context of the reasons as a whole, including the consideration the Commission expressly gave to imposing conditions addressing scope 1 and scope 2 GHG emissions. DAMSHEG's contention should be accepted.

306 Reference has already been made to the absence in the Commission's reasons of any express consideration of whether conditions addressing scope 3 GHG emissions should be imposed. When considered in the context of the terms and effect of both sub-cll (1) and (2) of cl 2.20 of the Resources SEPP, the structure and content of the Commission's reasons strongly support the inference sought by DAMSHEG being drawn.

307 In section 5.3 of its reasons, the Commission described the international, national and State policies concerning GHG emissions, including scope 3 emissions. In section 5.3.1 the Commission outlined the "assessment" of the GHG emissions, including scope 1, 2 and 3 emissions, and discussed scope 3 GHG emissions in the context of national policies and international agreements concerning GHG emissions, specifically the Paris Agreement. In recording its findings in section 5.3.2, the Commission adverted to scope 3 GHG emissions and (again) referred to the commitments of signatory countries to the Paris Agreement before specifically addressing conditions that are only referable to minimising scope 1 and 2 GHG emissions. The only further references to scope 3 GHG emissions were the references to GHG emissions generally in the concluding paragraph of that section and the second point in the conclusion of the reasons.²³⁷ Both of those references involve a consideration of the assessment of scope 3 GHG emissions as contemplated by cl 2.20(2). All this strongly suggests the Commission discharged the obligation described in cl 2.20(2) in relation to all GHG emissions, but only discharged the obligation described in cl 2.20(1)(c) in relation to scope 1 and 2 GHG emissions.

308 In rejecting the inference DAMSHEG sought to have drawn, the Court of Appeal appears to have placed particular reliance on paragraph 150 of the Commission's reasons, which refers to the Project's scope 3 GHG emissions being "appropriately regulated and accounted for" under national policies and international agreements such as the Paris Agreement. In this Court, MACH also placed reliance on that paragraph. However, paragraph 150 (and 151) is addressed to the assessment (and accounting) of GHG emissions and how they are dealt with (or regulated) under the applicable State, national and international policies; evidently, that paragraph addresses cl 2.20(2).

237 Extracted above at [300] and [303].

309 Even if paragraph 150 (and the balance of the Commission's reasons) meant that I, like the Court of Appeal, was "persuaded that the effect of the Commission's consideration of how Scope 3 emissions would be controlled is that it cannot be inferred that the Commission failed to consider whether conditions ought be imposed on Scope 3 emissions",²³⁸ which I am not, that would not be fatal to DAMSHEG's contention. In that event, I would remain of the view that the Commission did not consider cl 2.20(1)(c) by considering whether the consent should be issued subject to conditions to ensure that scope 3 GHG emissions are minimised to the greatest extent practicable. As noted, that is a much sharper obligation than simply considering whether scope 3 GHG emissions are appropriately regulated or accounted for by reference to an international treaty. If cl 2.20(1)(c) had been addressed in relation to scope 3 GHG emissions, comprising 98 per cent of all GHG emissions generated by the Project, and the Commission had decided not to impose conditions, then it is to be expected that the Commission would either have referred to possible conditions and their ineffectiveness or impracticability, or at least have stated that no such conditions were proposed and the Commission had limited material available to it to address what form such conditions could take or whether the development consent should be issued subject to any such conditions.

310 MACH also placed reliance on the express reference to cl 2.20(1) in paragraph 154 of the Commission's reasons. However, that reference supports the drawing of the inference that DAMSHEG seeks. In that paragraph the Commission refers to "2.20(1) and 2.20(2)" in the context of making a finding only concerning the "estimation" (that is, the assessment) of scope 1 and scope 2 GHG emissions (emphasis added).

DAMSHEG's "forensic decision"

311 DAMSHEG also contended that, in rejecting its argument that the Commission failed to properly comply with s 4.15(1)(a)(i) of the EPA Act insofar as it refers to cl 2.20(1)(c) of the Resources SEPP, the Court of Appeal erred to the extent it relied on DAMSHEG's supposed "forensic decision" not to suggest to the Commission that it impose conditions addressing scope 3 GHG emissions. That contention should be accepted.

312 The fact that none of MACH, the Department, DAMSHEG or any other interested party expressly submitted to the Commission that consideration should be given to granting consent to the development application subject to conditions designed to minimise scope 3 GHG emissions can affect the analysis in at least two ways.

238 *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* (2025) 263 LGERA 264 at 318 [229].

313 On the one hand, the failure of the parties to expressly address the subject matter of cl 2.20(1)(c) relating to scope 3 GHG emissions can add to the basis for drawing an inference that, before granting the development consent, the Commission did not give any consideration to so much of cl 2.20(1)(c) as required the Commission to consider whether to impose conditions to ensure that such emissions are minimised to the greatest extent practicable. On the other hand, the absence of any submissions made to the Commission about such conditions and their practicability can make it harder to establish that any particular level of consideration the Commission might have given to imposing conditions to address scope 3 GHG emissions did not comply with s 4.15(1)(a)(i) insofar as it refers to cl 2.20(1)(c) of the Resources SEPP. This is so because the relative paucity of submissions and material concerning such conditions meant there was little material the Commission could engage with by way of an "active intellectual process".²³⁹

314 The former is the case here. The Commission produced otherwise comprehensive reasons clearly addressing issues raised by the Department and the contentions made by MACH and interested parties. In those circumstances, the absence of any express reference in the reasons to any consideration of whether to impose conditions addressing scope 3 GHG emissions tends to suggest that the Commission confined itself to only considering those contentions.

315 In many statutory contexts, if a decision maker confines themselves to addressing the contentions made by interested or affected parties, that may be sufficient to discharge the relevant statutory obligation, at least in a particular case. But that is not this case. The effect of the grant of a consent to a development application is not limited to affecting the rights and obligations of an individual or entity vis-a-vis the State. Instead, as the EPA Act recognises,²⁴⁰ the grant of a development consent, especially a consent to an application for State significant development, has the capacity to significantly affect the broader (and local) environment and all the disparate groups within it. The Commission's duty to consider cl 2.20(1)(c) was not obviated by the apparently all-or-nothing approach adopted by both MACH and DAMSHEG. The public interest loomed large over the exercise of the Commission's function.

316 The description "forensic decision" applied by the Court of Appeal to the approach adopted by an interested party such as DAMSHEG can be a distraction in the context of a decision of the kind made by the Commission in this case. Although it may have appeared that way, the interested parties who made submissions to the Commission were not engaged in an adversarial contest. A

239 See *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at 599-600 [25]-[26].

240 EPA Act, s 1.3.

deliberate decision by a party affected by an administrative decision not to address the decision maker about mandatory statutory criteria, or provide available material relevant to those criteria, might warrant the refusal of relief by way of judicial review on discretionary grounds,²⁴¹ but that has no application here. It was not submitted to this Court that relief should be refused on a discretionary basis and, even if it had been, the broad interests affected by the Commission's decision would weigh against its exercise.

317 Otherwise, as noted, the potential significance in the present context of the absence of such submissions or material is that it could have borne upon an assessment of whether any particular consideration the Commission might have given to imposing conditions to address scope 3 GHG emissions conformed with s 4.15(1)(a)(i) insofar as it refers to cl 2.20(1)(c). Ultimately, however, that point does not arise because the Commission never embarked upon any such consideration.

Finding

318 DAMSHEG proved that the Commission failed to consider so much of cl 2.20(1)(c) of the Resources SEPP as provides that, before granting consent, the Commission was obliged to consider whether to grant consent subject to conditions to ensure that all GHG emissions, including scope 3 GHG emissions, are minimised to the greatest extent practicable. The Court of Appeal erred in finding otherwise.

Materiality

319 I agree with Gordon J that the Commission's error in relation to s 4.15(1)(a)(i) of the EPA Act and cl 2.20(1)(c) of the Resources SEPP was material and constituted jurisdictional error.²⁴²

Conclusion

320 Ground 1 of DAMSHEG's amended notice of contention should be upheld.

321 The orders proposed by Gordon J should be made.

241 See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 47-48, 67; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 108 [56].

242 Reasons of Gordon J at [192]-[201].