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Office of the Independent Planning Commission NSW
Suite 15.02, Level 15, 135 King Street
SYDNEY NSW 2000

Via online submission and email: ipcn@ipcn.nsw.gov.au

8 March 2022

Dear Professor O'Kane AC, Professor Barlow and Professor Fell AO,

Australian Conservation Foundation Incorporated (ACF) Response to Additional Material
Narrabri Underground Coal Mine – Stage 3 Extension Project (SSD 10269)

This letter is a response to the additional material provided by the Applicant[1]. The Applicant's additional material contains a submission from law firm Ashurst (the **Ashurst submission**).

ACF asked law firm, Maddocks, to review the Ashurst submission. The letter from Maddocks to ACF in response is **annexed**. It comprehensively addresses the Ashurst submission and identifies significant failings in the foundation of the Applicant's approach. ACF relies on the content of the Maddocks' letter.

Observable phenomena and science uniformly suggest urgent action to stem greenhouse gas (**GHG)** emissions is required. Previous decisions of the IPC need to be considered in that light. Changing circumstances give rise to the need for previous positions to be revisited. On 28 February 2022 the IPCC released *Climate Change 2022: Impacts, Adaptation and Vulnerability* - the co-chair when releasing the report stated:

> *The scientific evidence is unequivocal: climate change is a threat to human wellbeing and the health of the planet. Any further delay in concerted global action will miss a brief and rapidly closing window to secure a liveable future.*[2]

This letter addresses the following matters in response to the additional material:

- Lack of Evidence on Scope 3 impacts on NSW
- The Carbon Budget
- The Relevance of National Determined Contributions
- Market Substitution

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[1] Letter to IPC from Whitehaven Coal dated 25 February 2022. Bundled with the letter (although not referred to in it is a document prepared by Ashurst titled *Narrabri Underground Coal Mine – Stage 3 Extension Project (SSD 10269) SUBMISSION TO THE INDEPENDENT PLANNING COMMISSION ON GREENHOUSE GAS EMISSIONS AND CLIMATE CHANGE* dated 25 February 2022.
[2] *Working Group II Contribution to the IPCC Sixth Assessment Report* https://www.ipcc.ch/report/ar6/wg2/resources/press/press-release

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Lack of Evidence on Scope 3 impacts on NSW

1. The applicant relied on the "*double-counting*" contention in the EIS.[3] Consequently, no assessment of the impact on NSW of the Scope 3 emissions is provided **at all**. There is therefore a serious gap in the evidence base of the applicant's application.

2. Maddocks make the legal point that Scope 3 emissions **do** need to be considered as an impact of the project.

3. However, it is submitted that even if the applicant's position is accepted, that the consideration of Scope 3 emissions is a matter of discretion for the IPC, evidence should still have been provided. That is because to make an evaluative judgment and provide an evident and intelligible justification in relation to the exercise of that discretion the IPC needs some evidence of the impact. A proper consideration of whether the benefits of the project outweigh the impacts cannot be carried out without detailed assessment of the Scope 3 emissions.

4. This assessment is made more important by the publicly available, credible information about the consequences for NSW of global warming.

5. The NSW Land and Environment Court (the **LEC**) has previously received and accepted evidence of future changes in the climate of mid-NSW north coast region and inland region, as follows:

> *Projected changes in the climate of mid-NSW North Coast region and adjacent inland region (as part of the East Coast region) include (CSIRO and BoM 2015):*
>
> *a) Average temperatures will continue to increase in all seasons (very high confidence).*
>
> *b) More hot days and warm spells are projected with very high confidence. Fewer frosts are projected with high confidence.*
>
> *c) Decreases in winter rainfall are projected for East Coast South with medium confidence. Other changes are possible but unclear.*
>
> *d) Increased intensity of extreme rainfall events is projected, with high confidence.*
>
> *e) Mean sea level will continue to rise and height of extreme sea-level events will also increase (very high confidence).*
>
> *f) A harsher fire-weather climate in the future (high confidence)." (p 5).*[4]

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[3] Whitehaven Coal, 2020. *Section 6: Assessment of Impacts*. Narrabri Underground Mine Stage 3 Extension Project at 6-126. Available at: https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-10269%2120201023021129.246%20GMT

[4] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at [438]

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6. The *Intergovernmental Panel on Climate Change's Sixth Assessment Report* (2022) contains details of projected impacts of climate change on NSW, including:

   6.1 Sea level rise in Newcastle of 14-30 cm by 2050 and 22-54 cm by 2090 (in the conservative scenario of a 2.0C increase).

   6.2 Annual severe fire weather days in eastern Australia to increase by up to 30% by 2050 (in the conservative scenario of a 2.0C increase).

   6.3 Reduced river flow and mass fish kills in the Murray-Darling Basin.

   6.4 Average number of moderate to severe heat stress days for livestock to increase to 31-42 days by 2050, compared to 1970-2000.

   6.5 Unprecedented temperatures as high as 50 degrees Celsius in Sydney (in the conservative scenario of a 2.0C increase).

   6.6 High temperatures will amplify air pollution and without adaptation, ozone-related deaths in Sydney may increase by 50-60 per year by 2070[5].

7. In the face of scientific evidence, factual findings by superior courts and present-day tragedies caused by unprecedented rain events – the question of whether NSW should be permitting another 490 MtCo2-e to be emitted should be being assessed by the proponent such that the IPC has sufficient material before it to make an informed decision.

The Carbon Budget

8. The Ashurst submission focuses heavily on the "*carbon budget approach*". ACF referred to this in its submission of 25 February2022. Use of that terminology ought not obscure the key uncontroversial proposition. That is, that there is an upper quantitative limit on net GHG emissions which can be released before the global (and hence NSW) temperature exceeds levels that are accepted to be safe, and which will avoid catastrophic consequences.

9. The carbon budget is a conceptual framework to address the non-linear nature of climate related impact. There is a global scientific consensus, which has been accepted by Australian Courts, that if temperature rise exceeds certain levels the impacts become catastrophic.[6] The LEC is one such court.

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[5] https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_FinalDraft_Chapter11.pdf
[6] *Sharma v Minister for the Environment (No 2)* [2021] FCA 774 at [29] – [75]

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10. The Ashurst submission deals at length with the decision in *Gloucester Resources Limited v Minister for Planning*[7] (***Rocky Hill***). The Ashurst submission simultaneously seeks to urge the IPC to ignore and embrace the decision. The Ashurst submission states at [24](f): *the* [LE] *Court in Rocky Hill did not adopt the carbon budget approach…"*

11. This statement fails to address a key piece of *Rocky Hill* and has selectively quoted from it. The paragraph that immediately follows the Ashurst submission extract states (at [554]):

> *In absolute terms, a particular fossil fuel development may itself be a sufficiently large source of GHG emissions that refusal of the development could be seen to make a meaningful contribution to remaining within the carbon budget and achieving the long term temperature goal. In short, refusing larger fossil fuel developments prevents greater increases in GHG emissions than refusing smaller fossil fuel developments.*
>
> And also (at [556]):
>
> *Refusal of consent to the Project would prevent a meaningful amount of GHG emissions, although not the greater GHG emissions that would come from refusal of a larger coal mine…The GHG emissions of the Project and their likely contribution to adverse impacts on the climate system, environment and people adds a further reason for refusal.*

12. Contrary to the Ashurst submission the Court **did** adopt the carbon budget approach in *Rocky Hill*.

13. For example, Preston CJ adopted the carbon budget approach in *Rocky Hill* for the purposes of estimating the level of GHG emission reductions required to meet the *Paris Agreement* [at 441]:

> *A commonly used approach to determine whether the NDCs of the parties to the Paris Agreement cumulatively will be sufficient to meet the long term temperature goal of keeping the global temperature rise to between 1.5ºC and 2ºC is the carbon budget approach. The carbon budget approach is based on the well-proven relationship between the cumulative anthropogenic emissions of GHGs and the increase in global average surface temperature. The carbon budget approach "is a conceptually simple, yet scientifically robust, approach to estimating the level of greenhouse gas emission reductions required to meet a desired temperature target", such as the Paris Agreement targets of 1.5ºC or 2ºC (Steffen report [38])*

14. Preston CJ also considered the relevance of the carbon budget approach in respect of offsetting in response to the Applicant's argument that the increase in GHG emissions associated with the Project would not necessarily cause the carbon budget to be exceeded, because reductions in GHG emissions by other sources (such as in the electricity generation and transport sectors)

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[7] [2019] NSWLEC 7

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or increases in removals of GHGs by sinks (in the oceans or terrestrial vegetation or soils) could balance the increase in GHG emissions associated with the Project.

> *I do not accept this reason. It is speculative and hypothetical. There is no evidence before the Court of any specific and certain action to "net out" the GHG emissions of the Project. A consent authority cannot rationally approve a development that is likely to have some identified environmental impact on the theoretical possibility that the environmental impact will be mitigated or offset by some unspecified and uncertain action at some unspecified and uncertain time in the future. This is not a case where the applicant for development consent commits to taking specific and certain action to mitigate and offset the environmental impact of the proposed development. In the climate change context, for example, an applicant for development consent could commit to reducing the GHG emissions of the development by deploying emission reduction technologies, such as carbon capture and storage, or offsetting the GHG emissions of the development by increasing the removal of GHGs in the atmosphere by establishing sinks, such as by reafforestation or afforestation of land. The Rocky Hill Coal Project, however, is not proposed to be carbon neutral. GRL has not proposed to balance the emissions by sources with removals by sinks.*

15. The correct position is that the LEC, having adopted the carbon budget approach, considered that a case-by-case approach was still required.

16. The Ashurst submission asserts the carbon budget approach is "*not endorsed by*" and is "*inconsistent*" with the *Paris Agreement*. It is unclear what "*endorsed by*" is intended to mean. It is true the word "*budget*" does not appear in the Paris Agreement. ACF assumes Ashurst is embracing the language of a differently constituted IPC panel who used this language in its decision on the Vickery Extension Project SSD 7480.[8]

17. Th Vickery decision does not explain what "*endorsed*" means and does not explain how the *Paris Agreement* and the carbon budget relates. This is not a criticism of the IPC. It is simply making the observation that close consideration of the carbon budget concept was not provided. ACF submits that the IPC can apply the carbon budget in this context without contradiction of the Vickery decision.

18. As Preston CJ has noted writing extra-curially[9]:

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[8] https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2020/03/vickery-extension-project/determination/vickery-extension-project--statement-of-reasons.pdf at [220]

[9] Hon. Justice Brian J Preston "*The Impact of the Paris Agreement on Climate Change Litigation and Law*" Dundee Climate Conference 'Elements of a 'European', 'International', 'Global' Climate Consensus after Paris?' 27-28 September 2019, University of Dundee, United Kingdomhttps://www.lec.nsw.gov.au/content/dam/dcj/ctsd/lec/documents/speeches-and-papers/Preston_CJ_-_The_Impact_of_the_Paris_Agreement_on_Climate_Change_Litigation_and_Law.pdf

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> *While the Paris Agreement does not assign each country a carbon budget, scientists are able to use the long-term temperature goal to calculate the remaining global carbon budget. Indeed, many estimates of the remaining carbon budget have been published.* [Footnote omitted]
> …
> *In Urgenda II, the Court of Appeal noted that "insight has developed over the past few years that a safe temperature rise should not exceed 1.5ºC"*[Footnote omitted] *The aspirational Paris Agreement target was used as a 'starting point' for considering the limited budget remaining for emissions and the urgency of action.* [Footnote omitted]

19. The carbon budget arises from the global consensus on limiting temperature rise. It is **consistent** with the *Paris Agreement* to calculate a figure for future emissions that can be released before the temperature thresholds in the *Paris Agreement* are reached.

20. It is noted that since *Rocky Hill* the urgency of action to reduce GHG emissions has increased and the room in the carbon budget, before catastrophic consequences arise, decreased.

21. The IPCC Sixth Assessment Report indicates 1.5C is an upper threshold which itself will cause significant impacts globally. The 28 February 2022 *Headline Statement from the Summary for Policy Makers*[10] states:

> *B.3 Global warming,* ***reaching 1.5°C in the near-term, would cause unavoidable increases in multiple climate hazards and present multiple risks to ecosystems and humans (very high confidence).*** *The level of risk will depend on concurrent near-term trends in vulnerability, exposure, level of socioeconomic development and adaptation (high confidence). Near-term actions that limit global warming to close to 1.5°C would substantially reduce projected losses and damages related to climate change in human systems and ecosystems, compared to higher warming levels, but cannot eliminate them all (very high confidence).* (**emphasis added**)

22. Maddocks refers to several cases that reference the relevance of the carbon budget.

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[10] IPCC, 2022: *Summary for Policymakers* [H.-O. Pörtner, D.C. Roberts, E.S. Poloczanska, K. Mintenbeck, M. Tignor, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem (eds.)]. *In: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [H.-O. Pörtner, D.C. Roberts, M. Tignor, E.S. Poloczanska, K. Mintenbeck, A. Alegría, M. Craig, S. Langsdorf, S. Löschke, V. Möller, A. Okem, B. Rama (eds.)]. Cambridge University Press. In Press.

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The Relevance of National Determined Contributions (NDCs)

23. The Ashurst submission does not expressly state how customer countries' NDCs are relevant to the IPC's task. However, it appears to invite the IPC to conclude that NDCs are a vehicle that will deliver a safe global temperature outcome for NSW. At [41] is the observation "*NDCs are unilateral, high-level policy plans that set out the contribution each country is nationally determined to make towards the global "well below 2°C" goal.*" The submission also invites the IPC to conclude that countries, predicted to be customers for the development, have adopted NDCs commensurate with delivering a global temperature safe for NSW.

24. ACF submits that both invitations must be rejected for two reasons.

25. Firstly, the assumption that the NDCs of signatory countries will achieve a safe global temperature for NSW is unfounded. Article 3 of the *Paris Agreement* provides:

> *"As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious effort…with the view to achieving the purpose of this Agreement as set out in Article 2."*

26. The *Paris Agreement* does not contain a mechanism whereby NDCs **ensure** that the total GHG emissions are consistent with the temperature target. NDCs are at the discretion of the party. This is acknowledged at [64] of the Ashurst submission, which states that Australia is "*not bound under international law to achieve the emission reduction target in its NDC…*".

27. Secondly, there is strong evidence the NDC's committed to are **not working** with respect to safe global temperatures. The UNFCCC's *Nationally determined contributions under the Paris Agreement - Synthesis report by the secretariat* was released on 17 September 2021[11] and updated on 25 October 2021. It contains a graphic which illustrates that current NDCs are not consistent with a safe global temperature in NSW, this is recreated in **Figure 1**. It shows that the trajectory for current NDCs (in red) far exceeds 1.5C.

[11] Available in full here https://unfccc.int/sites/default/files/resource/cma2021_08_adv_1.pdf

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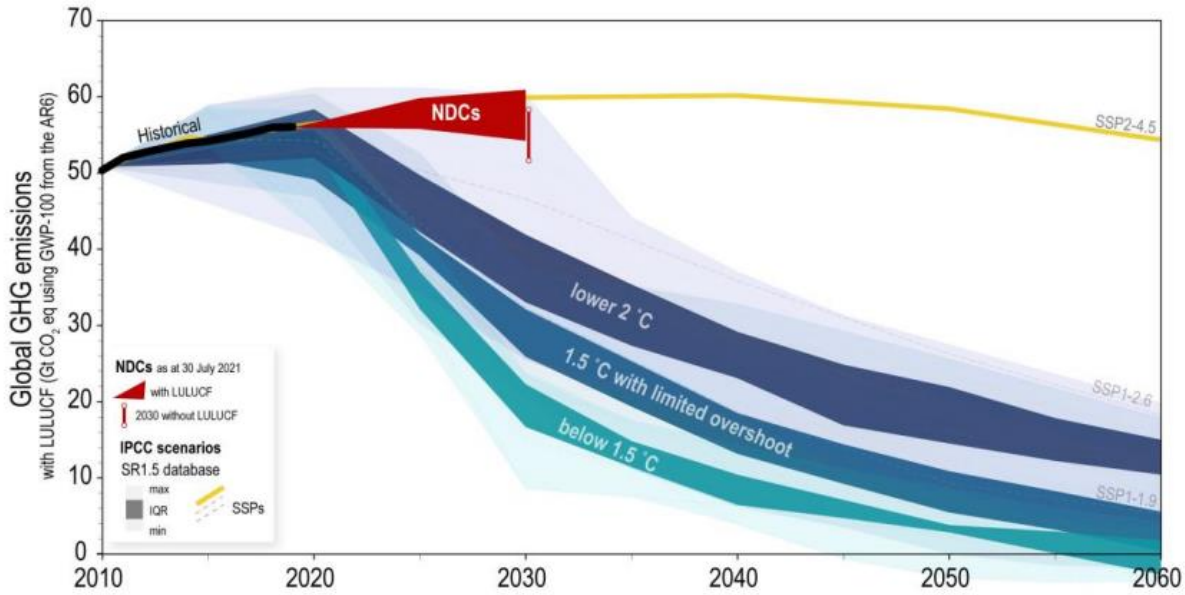
Figure 1 – Extract Synthesis Report

Figure 9
Comparison of global emissions under scenarios assessed in the Intergovernmental Panel on Climate Change Special Report on Global Warming of 1.5 °C with total global emissions according to nationally determined contributions



28. The updated synthesis report was accompanied by a UN climate press release[12] which states:

> *However, the updated report also confirms that for all available NDCs of all 192 Parties taken together, a sizable increase, of about 16%, in global GHG emissions in 2030 compared to 2010 is anticipated. Comparison to the latest findings by the Intergovernmental Panel on Climate Change (IPCC) shows that such an increase, unless changed quickly, may lead to a temperature rise of about 2.7°C by the end of the century.*

Keeping in mind the observation that current NDCs will likely result in a 16% **increase** in GHG emissions in 2030 - the press release also states:

> *The IPCC has estimated that limiting global average temperature increases to 1.5C requires a reduction of CO2 emissions of 45% in 2030 or a 25% reduction by 2030 to limit warming to 2C.*

[12] https://unfccc.int/news/updated-ndc-synthesis-report-worrying-trends-confirmed

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29. The IPC can take no comfort that the NDC mechanism will result in coal from the project not contributing to dangerous climate change impacts for NSW.

30. Maddocks address this issue in further detail and point out that:

- the assumption that impacts inherent in a commitment are acceptable should not be made; and
- Ashurst have stated that the proponent does not know where the coal will ultimately be used. It follows that there can be no comfort that the coal will be used in countries with sufficient, enforceable (and enforced) relevant commitments.

Market Substitution

31. ACF's submission of 25 February 2022 notes the previous rejection of this proposition (by the LEC) and points to the lack of evidence to support it in this context (see [21] – [22]).

32. The Ashurst submission presents the position at [100] as follows:

> *If the Project is not approved, then there is a real likelihood that demand will be met by coal of inferior quality (in terms of calorific value) than the Project's product coal, which would result in more GHG emissions being emitted globally than if the Project is approved.*

33. At [101](a) the submission states that coal demand is such that "*global demand for coal will require expansion of approved coal mines (such as the Project)*". The same customer countries which the applicant points too here; are those it later asserts are moving to **reduce** GHG (Japan, Taiwan China, South Korea, India and South East Asia).

34. Ashurst refers to the IEA *Net Zero by 2050: A Roadmap for the Global Energy Sector* **without** drawing to the IPC's attention to the statement in that report that "[n]*o new coal mines or extensions are required…*"[13]

35. In trying to make out the market substitution argument the Ashurst submission spends significant time trying to establish future demand for coal. However, when read closely no quantitative information is provided which the IPC could rely on. Whilst the word "*supply*" is used, no meaningful information on supply is provided.

[13] https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf

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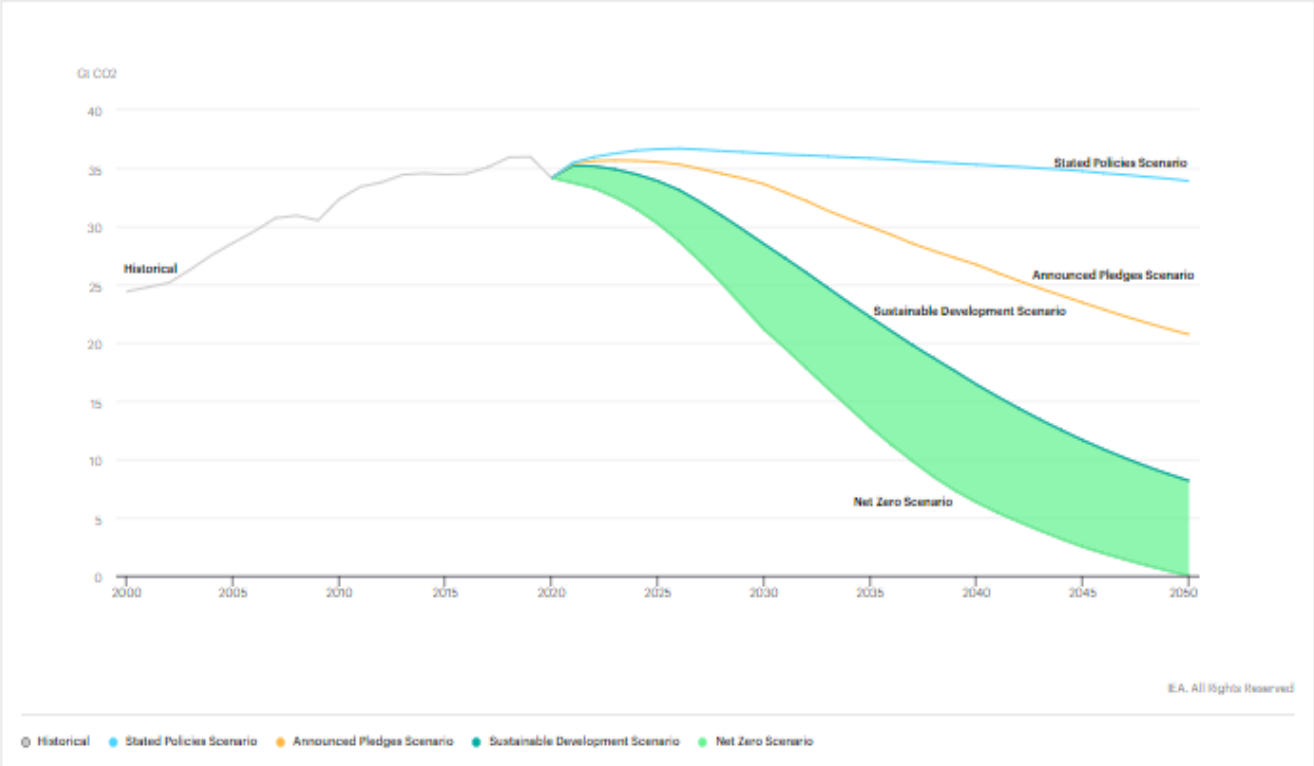
36. Ashurst states that two of the IEA "*World Energy Outlook scenarios*", the Stated Policies (STEPS) and Announced Pledges (APS) scenarios, demonstrate global demand for coal will require supply from new and expanded coal mines.

37. The **APS scenario** assumes that all climate commitments made by governments around the world (including NDCs) are met in full and on time. It is intended by the IEA to highlight the '*ambition gap*' of current climate change pledges that must be closed to achieve the goals agreed to under the *Paris Agreement*.

38. The **STEPS scenario** reflects current policy settings in place and announced by governments. It is intended to provide a benchmark to assess the limitations and achievements of recent developments in policy. The difference between the STEPS and APS scenarios is used to show the *'implementation gap'* that exists between pledges and policies of governments. In other words, the STEPS scenario is less ambitious than the APS scenario. **Figure 2** taken from the World Energy Outlook 2021 illustrates this graphically. Please note STEPS is equivalent to "Stated Policies" and APS "Announced Pledges".

Figure 2 – Extract from World Energy Outlook 2021



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39. Neither the APS or STEPS scenario are consistent with limiting global warming to "safe" levels—both would lead to increases in temperatures beyond 2.0C.[14] In the APS scenario, global emissions remain relatively static to 2050. In the STEPS scenario global emissions decline modestly by 2040 and are not close to zero in 2050.[15]

40. The scenarios Ashurst rely upon to claim that future demand for coal justifies the development of the Stage 3 Extension are inextricable from a future in which NSW is suffering the severe impacts of preventable climate change.

41. The IEA provides two **other** scenarios which would limit warming to well-under 2.0C. These scenarios, the Ashurst submissions implicitly admits, do not require coal from this project.

42. In short what is provided is a summary of select documents on predicted coal demand. The single reference to "supply" is based on the IEA's *Coal 2021: Analysis and forecast to 2024* which the submission itself states "*does not provide a long-term forecast*". Read carefully there is no data on actual supply. All that is provided is supply predictions based on GHG emission reduction scenarios.

43. There is no evidence as to the relationship between the coal to be supplied from this project and the speculated demand. The China example is irrelevant to the circumstances that are likely to exist after 2031.

44. With respect, it is insensible for Ashurst to make the statement quoted above at [32] **without credible data** on what the supply and demand is likely to be in the relevant periods. It is entirely possible based on the data provided, that supply will exceed demand after 2031.

45. There is no certainty and scant evidence that, coal with lower calorific value, will be substituted and to what degree. The IPC might ask - will it be 100% substitution or 5%? The IPC cannot rely on this speculation. The LEC has previously rejected such speculation.[16]

46. The market substitution argument is flawed for reasons ACF has set out in its first submission and as set out in Maddock's letter. The Ashurst submission does not cure this flaw. It is now clear there is no evidence, specific to this project, for the foundational proposition for this argument – that demand will exist post-2031 that won't be met by already approved supply.

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[14] https://www.iea.org/reports/world-energy-outlook-2021/scenario-trajectories-and-temperature-outcomes
[15] https://www.iea.org/reports/world-energy-model/understanding-weo-scenarios
[16] Above n 3 at [538] – [540]

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47. Thank you for considering this submission.

Kind regards

[redacted]

Adam Beeson
General Counsel

Annexure: Letter from Maddocks to ACF dated 8 March 2022

Maddocks

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8 March 2022

Mr Adam Beeson
General Counsel
Australian Conservation Foundation

Dear Sir

Additional Material in respect of the Narrabri Underground Coal Mine – Stage 3 Extension Project (SSD 10269)

Purpose of this letter

1. On 1 March 2022, the Independent Planning Commission (**IPC**) invited ACF to respond to the Additional Material in respect of the Narrabri Underground Coal Mine – Stage 3 Extension Project (SSD 10269) (**Project**).

2. We have been asked by ACF to advise on the legal issues raised in the Additional Material in the submissions dated 25 February 2022 written by Ashurst in respect of the Project (**Ashurst Submission**).

3. We understand that ACF will include this advice in its further submissions dated 8 March 2022.

Introduction

4. Part A of the Ashurst Submission deals with the law regarding the consideration of greenhouse gas (**GHG**) emissions and climate change in determining applications under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).

5. We set out below what, in our view, is the task of the IPC in evaluating and determining the State Significant Development (**SSD**) Application, with particular attention to the relevance of scope 3 GHG emissions.

6. There are three scopes of GHG emissions: scope 1, 2 and 3 emissions. Scope 3 emissions are defined in the Ashurst Submission as:

> indirect emissions that are a consequence of the activities of the Project, but occur at sources owned or controlled by other entities (e.g. outsourced services). Scope 3 emissions can include emissions generated upstream of the Project by providers of energy, materials and transport. Scope 3 emissions can also include

emissions generated downstream of the Project by transport providers and product use (e.g. burning product coal).[1]

7. The Ashurst Submission accepts that GHG emissions including scope 3 emissions can be considered[2]. They therefore accept that scope 3 emissions are a relevant consideration.

8. However, the Ashurst Submission asserts that:

8.1 it is the impacts on NSW only that may be considered;

8.2 the IPC must consider and determine the development application for the Project on its own merits, taking into account both the positive and negative impacts of the Project and all of the relevant considerations under the EP&A Act[3];

8.3 the result of that balancing exercise would be that the Project would be approved;

8.4 accounting for scope 3 emissions is double counting[4] and therefore not appropriate;

8.5 the carbon budget approach should not be used[5].

9. In our opinion:

9.1 if the IPC were to limit its consideration of impacts in the manner proposed by the Ashurst Submission, it would fall into error;

9.2 full and proper consideration must be given to scope 3 emissions because:

9.2.1 these are impacts of the Project on the environment – in particular where there can be no guarantees that these emissions will be offset – and because it is in the public interest;

9.2.2 the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (**Mining SEPP**) requires that scope 3 emissions be considered[6];

9.2.3 Ashurst's reliance on the *Environmental Planning and Assessment (Territorial Limits Bill) 2019* (**Territorial Limits Bill**) is misplaced. That Bill is not law (and indeed the fact that the Government saw the need to amend the law in this way suggests that scope 3 emissions and impacts outside NSW do need to be considered under the current law);

9.2.4 the distinction between impacts in NSW and impacts from burning the coal overseas is illusory. The impacts of global warming are global and as such they are an impact on NSW wherever the coal is burned;

9.3 we disagree with Ashurst's approach to the "double counting" of emissions and the carbon budget;

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[1] This definition is consistent with the definitions of indirect emissions and scope 3 emissions in the GHG Protocol
[2] at [22(h)] and [23] for example
[3] [14(g)]
[4] [14]
[5] [14(e) and (f)]
[6] The Mining SEPP has now been consolidated into the State Environmental Planning Policy (Resources and Energy) 2021). However, for the purposes of this submission, we refer to the previous numbering of the Mining SEPP

9.4 the Ashurst submissions prefer or place undue weight on what are described as economic and social benefits over and above other considerations. This is not consistent with the requirements of the EP&A Act;

9.5 if the application is approved then conditions can be imposed to require capture and management of scope 1 emissions and it is not correct to say as a general proposition that conditions cannot be imposed in respect of, for example, tracking, modelling and offsetting of scope 3 emissions.

The objects of the EP&A Act

10. The objects of the relevant legislation are important aids to the interpretation of the enactment or instrument. They provide indication of the purpose and context to which regard must be had[7].

11. The Ashurst Submission identifies some of the relevant objects of the EP&A Act as:

> a. to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources (s 1.3(a));
>
> b. to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment (s 1.3(b));
>
> c. to promote the orderly and economic use and development of land (s 1.3(c)); and
>
> d. to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State (s 1.3(i)).

12. But overlook:

> "(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats"

13. It is true that this is one objective amongst 10, but it is an important objective that is directly relevant to the determination of the application – to protect the environment. In turn the environment is defined in the EP&A Act as follows:

> ***environment*** includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings.

14. The Mining SEPP was an instrument made under the EP&A Act as delegated legislation. As such, its objects must be aligned with and consistent with the objects of the EP&A Act – the delegated legislation cannot be inconsistent with its enabling enactment. Its "Aims" include as noted by the Ashurst submissions:

> to establish appropriate planning controls to encourage ecologically sustainable development through the environmental assessment, and sustainable management, of development of mineral, petroleum and extractive material resources…

15. The objects of the Mining Act 1992 (**Mining Act**) are facilitative of the discovery and development of mineral resources in NSW but having regard to the need to encourage

[7] Interpretation Act 1987 s 33. For the correct approach to statutory interpretation see SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34 at [14];

ecologically sustainable development. The Mining Act itself casts the principles of ecologically sustainable development as an important context to which regard must be had.

16. The principles of ecologically sustainable development are therefore incorporated into both the objects of the EP&A Act and the Mining Act and are set out in s6(2) of the *Protection of the Environment (Administration) Act 1993* (**POEA Act**) as follows:

> For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs—
>
> (a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
>
> In the application of the precautionary principle, public and private decisions should be guided by—
>
> (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
>
> (ii) an assessment of the risk-weighted consequences of various options,
>
> (b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
>
> (c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
>
> (d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as—
>
> (i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
>
> (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
>
> (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

17. The word “environment” is defined in the POEA Act (and hence incorporated into the above definition of ecologically sustainable development) as follows:

> ***environment*** means components of the earth, including—
>
> (a) land, air and water, and
>
> (b) any layer of the atmosphere, and

(c) any organic or inorganic matter and any living organism, and

(d) human-made or modified structures and areas,

and includes interacting natural ecosystems that include components referred to in paragraphs (a)–(c).

The task of the IPC

18. The task of the IPC is to evaluate and determine the SSD Application. In doing this the issues before the IPC in making its determination so far as the impacts[8] of the Project are concerned, relevantly, can be stated sequentially:

18.1 What are the impacts and benefits of the Project?

18.2 What is the significance of those impacts?

18.3 Should (having regard to all of the relevant considerations) the Project be approved (this includes a consideration of the possible conditions to mitigate or abate impacts)?

18.4 If so, what conditions ought to be imposed?

The relevance of merits appeal decisions

19. Ashurst state at [24] of their submissions that:

> the IPC's approach to considering and weighing the relevant factors is not prescribed, dictated or restricted by the decision in Rocky Hill. The Applicant's position on the relevance of Rocky Hill is summarised as follows:
>
> a. the Court's decision in Rocky Hill was the determination of a merit appeal whereby the Court "stands in the shoes" of the consent authority and determines the merits of a development application. The Court's decision is, therefore, not a legal precedent that the IPC is obliged to follow...

20. However, Ashurst state at [26] that:

> The case of *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 is relevant to the type and nature of conditions of consent that may be imposed. Whilst that decision was also in a merit appeal like in Rocky Hill (and thus, has no precedent value), the Applicant considers that certain aspects of that decision are worth bringing to the IPC's attention.

21. Ashurst continue at [33] to not only draw the IPC's attention to this merits appeal decision, but to suggest that Justice Pain's logic in that case should be accepted:

> It stands to reason that, if Justice Pain's logic in [94] is accepted (which it should be)…

22. While a decision on a merits-based appeal may not bind the IPC, the approach taken by the Court to principled decision making is relevant, and observations made about what are or are not relevant or mandatory considerations are of assistance. In the same way that Ashurst suggest that the IPC 'should' consider the logic of Pain J in *Hunter*, the IPC can and should consider the logic and reasoning of the court in merits-based decisions, including the Land and Environment Court's decision in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (**Rocky Hill**).

[8] Noting of course that the impacts are not the only matters required to be considered in the evaluation process

What are the impacts on the environment of the proposed development

23. The obligation of the IPC is to evaluate the application having regard to *inter alia*[9]:

23.1 the provisions of any relevant environmental planning instrument, e.g. the Mining SEPP;

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

23.3 any submissions made in accordance with the Act or the Regulation;

23.4 the public interest.

24. The concept of the impact of a development includes not only the direct but also the indirect influences or effects of the action[10]:

> A consent authority, in determining a development application, is also required to take into consideration the likely impacts of the development, including environmental impacts on the natural and built environments (see 4.15(1)(b) of the EPA Act). The likely impacts of a development include both direct and indirect environmental impacts.
>
> As the Full Federal Court of Australia held in *Minister for Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24; [2004] FCAFC 190 at [53], the impact of an action includes not only the direct but also the indirect influences or effects of the action:
>
>> "'Impact' in the relevant sense means the influence or effect of an action: Oxford English Dictionary, 2nd ed, vol VII, 694-695. As the respondents submitted, the word "impact" is often used with regard to ideas, concepts and ideologies: "impact" in its ordinary meaning can readily include the "indirect" consequences of an action and may include the results of acts done by persons other than the principal actor. Expressions such as "the impact of science on society" or "the impact of drought on the economy" serve to illustrate the point. Accordingly, we take s 75(2) to require the Minister to consider each way in which a proposed action will, or is likely to, adversely influence or effect the world heritage values of a declared World Heritage property or listed migratory species. As a matter of ordinary usage that influence or effect may be direct or indirect. "Impact" in this sense is not confined to direct physical effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act [Environment Protection and Biodiversity Conservation Act 1999]. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter."
>
> The Court later indicated that "'all adverse impacts' includes each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether the consequences are within the control of the proponent or not." (at [57]).
>
> The Court held that the adverse impacts of the action, the Nathan Dam on the Dawson River, were not confined to the adverse impacts of the construction and

[9] EP&A Act s4.15(1)(a)(i), (b), (d) and (e) which applies by operation of s4.40 subject to the provisions of Division 4.7

[10] Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7 at [492]- [497]

> operation of the dam, but included the adverse impacts of the use of water downstream from the dam, including its use for growing and ginning cotton (at [60]).

25. The scope 3 emissions are therefore themselves impacts of the Project.

25.1 In the recent decision *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*[11] the Land and Environment Court rejected challenges to a decision of the IPC to not impose conditions relating to scope 3 emissions. That case proceeded on the basis that the impacts of the development included the scope 3 emissions.

25.2 Similarly, in *KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2) [2020] NSWLEC 179* (**Bylong**) the Land and Environment Court[12] rejected a challenge that the IPC had erred by taking the view that scope 3 emissions were not addressed in the relevant management plan[13]:

> The IPC's concern is about the impact of Scope 3 emissions, namely the downstream burning of coal which will produce something approaching 200 million tonnes of carbon dioxide over the life of the Project. This is a critical environmental impact. The issue raised by KEPCO regarding Scope 3 GHG emissions is artificial. The sole basis for KEPCO's complaint appears to be that the IPC alluded to the fact that the GHG Management Plan seemed to relate only to Scope 1 and 2 emissions but did not resolve one way or another whether it was so confined. In oral submissions KEPCO suggested this was an irrational conclusion because that GHG Management Plan did in fact deal with Scope 3 emissions. This is factually wrong. The types of emissions KEPCO alluded to in making that submission were marginal in nature. The Scope 3 emissions addressed in KEPCO's GHG Management Plan are separated into indirect emissions associated with the production and transport of fuel and separately the use of thermal coal. None of the measures contemplated to minimise GHG emissions capture off-site Scope 3 emissions. The conditions proposed by the Department also failed to address Scope 3 emissions. Condition 19(d) proposed by the Department was to "implement all reasonable and feasible measures to minimise the release of greenhouse gas emissions from the site". This contemplates onsite emissions which are Scope 1 and 2, and therefore does not consider Scope 3 emissions.

25.3 In Rocky Hill Preston CJ said:

25.3.1 at [486]:

> The Rocky Hill Coal Project will result in GHG emissions. The Air Quality and Health Risk Assessment for the amended EIS estimated the Scope 1 and Scope 2 emissions to be about 1.8Mt CO2-e over the life of the mine and Scope 3 emissions to be at least 36Mt CO2-e. The estimated scope 3 emissions are limited to the emissions from the combustion of product coal from the Project by end users, such as steel mills and electricity power stations, as the emissions from shipping of product coal were not included. GHG emissions from the combustion of product coal by end users are downstream emissions.

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[11] [2021] NSWLEC 110

[12] KEPCO Bylong Australia Pty Ltd v Independent Planning Commission (No 2) [2020] NSWLEC 179

[13] And similarly, in Court of Appeal KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc [2021] NSWCA 216 at [139]. The IPC noted that the measures proposed by KEPCO related only to minimising Scope 1 and 2 greenhouse gas emissions, not Scope 3 greenhouse gas emissions (at [660] and [696]). As KEPCO did not propose to minimise Scope 3 greenhouse gas emissions at all, but instead only Scope 1 and 2 greenhouse gas emissions, the IPC was of the view that KEPCO "has not minimised Scope 1, 2 and 3 GHG emissions to the greatest extent practicable"

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

25.3.2 at [501]:

in *Gray v Minister for Planning*, the Scope 3 emissions from the downstream use (burning) of coal mined from the proposed Anvil Hill coal mine in the Hunter Valley was held to be a relevant matter that needed to be taken into consideration in the environmental assessment and approval of the coal mine (at [126], [130]).

25.3.3 at [513] following a comprehensive review of cases that have held scope 3 emissions to be mandatory relevant maters or relevant matters:

I find, therefore, that the consideration of the impacts of the Project on the environment and the public interest justify considering not only the Scope 1 and Scope 2 emissions but also the Scope 3 emissions of the Project.

26. In addition, the impacts on the environment, include impacts on humans and human safety.

27. As stated above, the objects of the EP&A Act include (relevantly) "to protect the environment" and "to facilitate ecologically sustainable development", and one of the objects of the Mining Act is to "encourage ecologically sustainable development". Ecologically sustainable development can be achieved through "inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations."

28. The definition of environment in the EP&A Act includes "all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings". Therefore, when assessing impacts on the environment, the decision-maker is required to considered impacts that affect humans.

29. Therefore, the impacts on greenhouse gas emissions on humans and human safety is a relevant consideration.

30. In *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 (**Sharma**), the Federal Court held that the protection of human safety is an additional mandatory consideration not expressly provided for in the EPBC Act, and that the Minister has a duty to take reasonable care to avoid causing personal injury to the Children when deciding to approve or not approve an action under the EPBC Act (in that case, the extension of the Vickery coal mine to increase production).

31. In making this decision, the Federal Court considered that:

31.1 people and in particular future generations of people, should be able to enjoy the "health, diversity and productivity" of the environment is, however, a matter emphasised by the "principle of inter-generational equity" expressed in s 3A(c);[14]

31.2 "protection of the environment" is an object of the EPBC Act (s 3(1)(a)) and the definition of the term "environment" given by s 528 refers specifically to "people and communities";[15]

31.3 the preservation of human life and the avoidance of personal injury is likely to be a relevant consideration whenever decisions are made about a matter which may give rise to a danger to human safety;[16]

[14] Sharma, at [158]
[15] Sharma, at [158]
[16] Sharma, at [398]

31.4 the avoidance of death and personal injury to humans by the taking of reasonable care may legitimately be regarded as the obvious intent of any legislative scheme which confers functions or powers capable of creating a danger to human safety, unless a contrary intention is shown;[17]

31.5 the EPBC Act's purpose is in part protective of people and communities as a defined part of the environment. It is impossible to accept that if the Minister was called upon to approve or not approve an activity which potentially endangers human safety – for example, the extraction of asbestos from a new mine – the scheme of the EPBC Act would permit the Minister to choose freely whether or not she should consider human safety in making her decision;[18]

31.6 [human safety] is a relevant consideration which arises by implication from the subject-matter, scope and purpose of the EPBC Act.[19]

32. If the IPC does have a duty to take reasonable care to avoid causing personal injury to humans/children when determining applications under the EP&A Act in accordance with *Sharma,* then proper consideration by the IPC of the impacts of greenhouse gas emissions, including Scope 3 emissions, on the environment and humans and human safety would be consistent with discharging such a duty.

It is wrong to exclude consideration of scope 3 emissions on the basis that the IPC should limit consideration of impacts only to impacts in NSW

33. The Ashurst Submission asserts that the relevant impacts to be considered are the impacts in NSW and that the emission and impacts of scope 3 emissions are not impacts in NSW. This is legally and factually flawed for the following reasons.

34. The proposition in the Ashurst Submission at [22(a)] that "statutes are always read as restricted in their operation within territorial limits" is neither correct nor pertinent.

35. The case cited in support of this proposition is *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 per O'Connor J. In that decision the High Court was concerned with the proper construction of legislation and whether it was empowered by the Constitution or not. In the course of his judgment O'Connor J observes that statutes ought to be construed where possible so as not to exceed the power of Parliament. In the course of this discussion, he says:

> Most statutes, if their general words were to be taken literally in their widest sense, would apply to the whole world, but they are always read as being *prima facie* restricted in their operation within territorial limits. Under the same general presumption every statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rule of international law

36. The *Jumbunna* decision is not authority for the proposition that statutes are always read as restricted to their operation within territorial limits and that is not what O'Connor J said – he used the words "prima facie". His Honour's statement is one step in his discussion of the need not to presume that Parliament would intend to overstep its jurisdiction.

37. Naturally when seeking to regulate actions (as distinct from considering impacts) the legislature would be prima facie presumed to be regulating actions that occur within its jurisdiction. The NSW Parliament would not presume to regulate actions in Victoria. Similarly, when creating what have been called result offences (such as the pollution of

[17] *Sharma,* at [398]
[18] *Sharma,* at [405]
[19] *Sharma,* at [406]

waters) the Parliament of NSW is concerned about the results in NSW[20] - it has no jurisdiction to regulate results in Queensland.

38. The requirement to consider "impacts" is different from the regulation of actions or the prohibition of results. The proposition that the concept of "impacts" in the EP&A Act is so limited would also be inconsistent with the plain language used in the definition of the environment in the EP&A Act: "all aspects of the surroundings of humans…" - in particular when read in context and having regard to the purpose of the enactment. Accordingly, when the Act requires that a consent authority consider the impacts on the environment that definition of the environment must be applied. It is not limited to NSW.

39. Similarly, s12 of the *Interpretation Act* (NSW) does not limit the impacts to be considered to impacts in NSW. That provision provides:

> 12 References to New South Wales to be implied
>
> (1) In any Act or instrument—
>
> (a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for New South Wales, and
>
> (b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales.
>
> (2) In any Act or instrument, a reference to a body constituted by or under an Act or instrument need not include the words "New South Wales" or "of New South Wales" merely because those words form part of the body's name or title.

40. Subsection 12(1)(b) creates a prima facie presumption[21] and would have the effect that a reference to a "locality[22]" would be a locality in NSW or to "waters" would be waters in NSW. However, s 12 should not be taken to limit the definition of the "environment" in the EP&A Act or the POEA Act which refer to "all aspects of the surroundings of humans" or "components of the earth… and includes "interacting natural ecosystems".

41. Even if s12 of the *Interpretation Act* were to be taken as limiting the impacts to be assessed for example on the basis that the "environment" is a "thing" referred to in s 12, then the reference to the "environment" would have to be taken to being the environment "in and of New South Wales". The distinction here is drawn between the environment "in" NSW and the environment "of" NSW. The environment "of" NSW when read in counter distinction to the environment "in" NSW must be referring to the environment outside NSW – to environmental aspects outside NSW that impact NSW. Scope 3 emissions emitted outside NSW would impact the environment of NSW in that sense as well.

42. The proposition at paragraph [22(c)] of the Ashurst Submission that the *Guidelines for the economic assessment of mining and coal seam gas proposals* (dated December 2015) supports a more limited application of clause 14(2) of the Mining SEPP is also incorrect. That guideline relates to the economic assessment of the impacts of a development. It does not provide any guidance on the implementation of the Mining SEPP. Indeed, the Guidelines cannot be used as an aid to interpretation of the EP&A Act, the Mining Act or the Mining SEPP.

43. The assertion that the consideration of environmental impacts ought to be limited to impacts in NSW reflects an outdated view of how natural systems operate. An issue such as climate change is an issue that impacts the natural systems of the whole planet. A modern and

[20] See the discussion in Brownlie v State Pollution Control Commissions (1992) 27 NSWLR 78 in the NSW Court of Criminal Appeal
[21] Re Rinehart [2020] NSWSC 1624 at [108];104 NSWLR 274
[22] EP&A Act s4.15(1)(b) social and economic impacts in the locality

systemic view of the concept of impact on the environment needs to have regard to the natural systems that are impacted beyond NSW. That is consistent with the concept of the environment including interacting natural ecosystems.

44. This has recently been recognised by the Courts:

44.1 In *Rocky Hill* Preston CJ observes:

> All of the direct and indirect GHG emissions of the Rocky Hill Coal Project will impact on the environment. All anthropogenic GHG emissions contribute to climate change. As the IPCC found, most of the observed increase in global average temperatures is due to the observed increase in anthropogenic GHG concentrations in the atmosphere. The increased GHG concentrations in the atmosphere have already affected, and will continue to affect, the climate system. The current and future impacts of climate change were summarised by Professor Steffen and have been set out earlier in the judgment.
>
> The direct and indirect GHG emissions of the Rocky Hill Coal Project will contribute cumulatively to the global total GHG emissions. In aggregate, the Scope 1, 2 and 3 emissions over the life of the Project will be at least 37.8Mt CO2-e, a sizeable individual source of GHG emissions. It matters not that this aggregate of the Project's GHG emissions may represent a small fraction of the global total of GHG emissions. The global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove GHGs by sinks. As Professor Steffen pointed out, "global greenhouse gas emissions are made up of millions, and probably hundreds of millions, of individual emissions around the globe. All emissions are important because cumulatively they constitute the global total of greenhouse gas emissions, which are destabilising the global climate system at a rapid rate. Just as many emitters are contributing to the problem, so many emission reduction activities are required to solve the problem" (Steffen report, [57]).

44.2 In *Gray v Minister for Planning*[23], Pain J held:

> Climate change/global warming is widely recognised as a significant environmental impact to which there are many contributors worldwide but the extent of the change is not yet certain and is a matter of dispute. The fact there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process. The coal intended to be mined is clearly a potential major single contributor to GHG emissions deriving from NSW given the large size of the proposed mine. <u>That the impact from burning the coal will be experienced globally as well as in NSW</u>, but in a way that is currently not able to be accurately measured, does not suggest that the link to causation of an environmental impact is insufficient. (at [98]).

44.3 Recently in *Milieudefensie v Royal Dutch Shell*[24] the Hague District Court considered whether to order Royal Dutch Shell to reduce its emissions and considered the relationship between impacts globally and impacts on a specific region of Holland called Wadden. The Court observes:

> The court has included the proportionality of the reduction obligation in its interpretation of the unwritten standard of care. Proportionality has been discussed before, in the context of various sub-topics. The court considers that the CO2 emissions for which RDS can be held responsible by their nature pose a very serious threat, with a high risk of damage to Dutch residents and the inhabitants of

[23] (2006) 152 LGERA 258; [2006] NSWLEC 720

[24] case number / cause list number: C/09/571932 / HA ZA 19-379 (engelse versie)

> the Wadden region and with serious human rights impacts. This applies to both current and future generations. A characteristic feature of dangerous climate change is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this development. In turn, each reduction of greenhouse gas emissions positively contributes to countering dangerous climate. After all, each reduction means that there is more room in the carbon budget.

44.4 In *Sharma*,[25] Bromberg J in the Federal Court referred to the evidence of the impacts on Australia of a 2 degree increase in temperatures (a statement that can be applied to the environment of NSW):

> For Australia, Scenario 1 would significantly increase the likelihood in any given year of extreme weather events (King et al. 2017): (i) 77% likelihood of severe heatwaves, power blackouts and bushfires; and 74% likelihood of severe droughts, water restrictions and reduced crop yields. More generally, CSIRO and BoM 2020, have used simulations from the latest generation of climate models to project changes to Australia's climate over the next few decades. These projections would thus be relevant for a 1.5-2℃ world, and thus provide useful insights for Scenario 1:
>
> - Continued warming, with more extremely hot days and fewer extremely cool days.
> - A decrease in cool season rainfall across many regions of the south and east, likely leading to more time spent in drought.
> - A longer fire season for the south and east and an increase in the number of dangerous fire weather days.
> - More intense short-duration heavy rainfall events throughout the country.
> - Fewer tropical cyclones, but a greater proportion projected to be of high intensity, with ongoing large variations from year to year.
> - Fewer east coast lows particularly during the cooler months of the year. For events that do occur, sea level rise will increase the severity of some coastal impacts.
> - More frequent, extensive, intense and longer-lasting marine heatwaves leading to increased risk of more frequent and severe bleaching events for coral reefs, including the Great Barrier and Ningaloo reefs.
> - Continued warming and acidification of its surrounding oceans.
> - Ongoing sea level rise. Recent research on potential ice loss from the Antarctic ice sheet suggests that the upper end of projected global mean sea level rise could be higher than previously assessed (as high as 0.61 to 1.10 m global average by the end of the century for a high emissions pathway, although these changes vary by location).
> - More frequent extreme sea levels. For most of the Australian coast, extreme sea levels that had a probability of occurring once in a hundred years are projected to become an annual event by the end of this century with lower emissions, and by mid-century

[25] [2021] FCA 560 at [67]

for higher emissions.

45. Properly considered the distinction between impacts in NSW and impacts outside the NSW jurisdiction due to the contribution of scope 3 emissions to global warming is illusory. The impacts of global warming include a rise in sea levels; more frequent storms and more frequent bushfires and other impacts that will be felt in NSW.

Scope 3 emissions are relevant to the public interest

45.1 In *Rocky Hill*[26] Preston CJ observes:

> The consent authority is also required to consider the public interest (s 4.15(1)(e) of the EPA Act). The public interest has been held to include the principles of ESD: see Telstra v Hornsby Shire Council at [124] and Minister for Planning v Walker (2008) 161 LGERA 423; [2008] NSWCA 224 at [42], [43]. In turn, the principles of ESD, particularly the precautionary principle and principle of inter-generational equity, have been held to require consideration of the impact of a development on climate change and the impact of climate change on a development: see, for example, Gray v Minister for Planning (2006) 152 LGERA 258; [2006] NSWLEC 720; Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd (2007) 161 LGERA 1; [2007] NSWLEC 59; Aldous v Greater Taree City Council (2009) 167 LGERA 13; [2009] NSWLEC 17; and Hunter Environment Lobby Inc v Minister for Planning [2011] NSWLEC 221.
>
> Many courts have held that indirect, downstream GHG emissions are a relevant consideration to take into account in determining applications for activities involving fossil fuel extraction or combustion or electricity generated by fossil fuel combustion.

In any event the Mining SEPP requires consideration of scope 3 emissions

46. The Mining SEPP itself requires that indirect impacts such as scope 3 emissions be considered[27]:

> Without limiting subclause (1), in determining a development application for development for the purposes of mining… 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

The Territorial Limits Bill supports rather than undermines the proposition that scope 3 emissions need to be considered

47. At [36(d)] and [37(b) and (c)] of the Ashurst Submission reference is made to the Territorial Limits Bill in relation to the imposition of conditions. The quoted passage from the second reading speech includes:

> Whilst the United Wambo development consent related to overseas downstream greenhouse gas emissions, conditions like this one highlight a technical and jurisdictional issue with the Environmental Planning and Assessment Act 1979, which does not deal expressly with the extraterritorial impacts of development—that is, impacts of development outside the territorial limits of Australia and therefore outside the territorial capacity of the New South Wales planning system to effectively be involved with the enforcement of such conditions…

[26] [2019] NSWLEC 7 at [498] – [499]
[27] Mining SEPP cl 14(2) as quoted by Ashurst at [22]

48. It is apparent from this that there is an acceptance that, for the purpose of the consideration of impacts, the EP&A Act is not limited to impacts in NSW – although not expressly dealt with. One concern addressed by the Territorial Limits Bill is the inability to enforce conditions that relate to those impacts.

49. In any event the Territorial Limits Bill is not law, and is unlikely to become law. The Territorial Limits Bill was controversial and has not progressed in parliament since the second reading speech in the Legislative Assembly in October 2019 and the referral of the Bill to the Legislative Council's Portfolio Committee No. 7 – Planning and Environment (**Committee**).

50. On 12 November 2019, the Legislative Council's Selection of Bills Committee referred the provisions of Territorial Limits Bill to the Committee for inquiry and report. The Committee issued its report in March 2020[28]. There were almost 3000 submissions in respect of the inquiry with an "overwhelming majority" opposing the bill and noting concerns about climate change and the impacts of greenhouse gas emissions on climate change.

51. The Committee recommended that the Territorial Limits Bill is not passed in its current form, and if it is to proceed further, the Legislative Council proposed amendments to the bill to make clear that "for the avoidance of doubt, the bill does not prevent the consideration of scope 3 emissions".

52. The Committee made the following comments on the Territorial Limits Bill:

> 2.96 It is clear to the committee that, although for different reasons, the key stakeholders and community groups are each unhappy with the legislation. The overwhelming number of public submissions to the inquiry are opposed to it.
>
> 2.97 The committee is alarmed that this bill is being considered at a time when New South Wales is reeling from the impact of devastating bushfires and prolonged drought. The committee was particularly moved by evidence of the impact recent bushfires had on local communities. We note the broad ranging impacts of climate change that are predicted and currently being felt, including through bushfires, drought and public health impacts.
>
> 2.98 The committee shares the deep concerns of the thousands of stakeholders who provided submissions and strongly believes that immediate, sustained and global action is necessary to reduce climate change and its effect on populations and the environment. Burning of fossil fuels directly contributes to climate change and Australia, and in particular New South Wales, is already responsible for too much of the world's greenhouse gas emissions from burning of fossil fuels.
>
> 2.99 In the committee's view, the bill is designed to discourage planning authorities from considering the downstream greenhouse gas emissions of proposed developments in their assessments. The committee believes that New South Wales has a global as well as a local responsibility to reduce greenhouse gas emissions. The committee is not persuaded of the need for legislative change, as proposed by the NSW Government. The committee is also opposed to removing the consideration of greenhouse gases from the planning assessment process.
>
> 2.100 We do not accept that considering downstream greenhouse gas emissions in planning decisions goes against emissions accounting schemes under the Paris Climate Agreement. Instead, the committee believes that considering downstream greenhouse gas emissions supports international agreements aimed at reducing emissions and combating climate change.

[28] Report No 1, *Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 [Provisions]* (Legislative Council – Portfolio Committee No. 7 – Planning and Environment, March 2020), at paragraph 2.88.

2.101 The legislation does not address the key concerns of the NSW Minerals Council and the CFMMEU. Those concerns are directed to what may happen in the future rather than a presently existing situation. The stated aim of the NSW Government, through the Minister's second reading speech and its witnesses to this inquiry, is not to address those concerns but to prevent conditions of consent (such as in the Wambo decision) that may have an extraterritorial effect. However, the committee believes the effect of the bill would be far wider than the stated aim of stopping consent authorities imposing conditions relating to the foreign sale or trade in the resources sector. This is based on the following concerns with the bill:

• The new section 4.17A is not limited to the mining and extractive industries only, but may extend to all development requiring development consent.

• The use of the term 'impacts' is broad and goes beyond greenhouse gas or environmental effects.

• The new section 4.17A prevents any conditions being placed on an approval, even those voluntarily proposed by an applicant.

• Proposed section 4.17A(2)(a) is not limited to the regulation of downstream Scope 3 greenhouse gas emissions occurring outside Australia as a result of the development.

• Proposed section 4.17A(2)(b) would prevent a consent authority taking into account a range of environmental impacts occurring inside New South Wales itself.

2.102 The committee is also concerned with the proposed amendments to the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 under Schedule 2. A number of environmental, legal and community groups highlighted that removing the phrase 'including downstream emissions' from this policy would not only create confusion, but that it would also contradict well-established principles of New South Wales planning law. Given that the committee heard that emissions from mining projects are overwhelmingly from downstream sources, it is imperative that any assessment of the impacts of such projects continue to include this form of emission.

2.103 In conclusion, the committee recommends that the bill not be passed in its current form. If the bill is to proceed further, the Legislative Council should amend the bill as shown in Recommendation 2 to address concerns the raised in the inquiry.

The double counting argument

53. If the scope 3 emissions are an impact of the Project then they must be considered. The arguments about double counting do not rebut that requirement. The facts are:

53.1 if coal from the Project is sold then it will be burned;

53.2 if it is burned then it will produce GHG emissions;

53.3 the total Scope 3 (indirect) emissions over the life of the Project are estimated to be approximately 455.6 Mt CO2-e, which is an average of approximately 19.8 Mt CO2-e per annum;

53.4 GHGs will not just disappear but will linger in the atmosphere contributing to global warming.

53.4.1 In *Bushfire Survivors for Climate Act Inc v Environment Protection Authority*[29] (**Bushfire Survivors**) the evidence was at [72] and [76] (emphasis added):

(a) The primary greenhouse gases driving current anthropogenic (human-caused) climate change are carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O**). Most of the carbon dioxide that is not absorbed quickly by ocean and land 'sinks' will remain in the atmosphere for thousands of years. This means that the full effect of past and present emissions is yet to be felt.**

(b) Once emitted, greenhouse gases disperse throughout the global atmosphere where they act cumulatively to contribute to anthropogenic climate change.

53.4.2 The IPCC Climate Change 2013: The Physical Science Basis –summary for policymakers observes:

E.8 Climate Stabilization, Climate Change Commitment and Irreversibility

Cumulative emissions of CO2 largely determine global mean surface warming by the late 21st century and beyond (see Figure SPM.10). **Most aspects of climate change will persist for many centuries even if emissions of CO2 are stopped**. This represents a substantial multi-century climate change commitment created by past, present and future emissions of CO2. {12.5}

Cumulative total emissions of CO2 and global mean surface temperature response are approximately linearly related (see Figure SPM.10). Any given level of warming is associated with a range of cumulative CO2 emissions21, and therefore, e.g., higher emissions in earlier decades imply lower emissions later. {12.5}

Limiting the warming caused by anthropogenic CO2 emissions alone with a probability of >33%, >50%, and >66% to less than 2°C since the period 1861–188022, will require cumulative CO2 emissions from all anthropogenic sources to stay between 0 and about 1570 GtC (5760 GtCO2), 0 and about 1210 GtC (4440 GtCO2), and 0 and about 1000 GtC (3670 GtCO2) since that period, respectively23. These upper amounts are reduced to about 900 GtC (3300 GtCO2), 820 GtC (3010 GtCO2), and 790 GtC (2900 GtCO2), respectively, when accounting for non-CO2 forcings as in RCP2.6. An amount of 515 [445 to 585] GtC (1890 [1630 to 2150] GtCO2), was already emitted by 2011. {12.5}

A lower warming target, or a higher likelihood of remaining below a specific warming target, will require lower cumulative CO2 emissions. Accounting for warming effects of increases in non-CO2 greenhouse gases, reductions in aerosols, or the release of greenhouse gases from permafrost will also lower the cumulative CO2 emissions for a specific warming target (see Figure SPM.10). {12.5}

A large fraction of anthropogenic climate change resulting from CO2 emissions is irreversible on a multi-century to millennial time scale, except in the case of a large net removal of CO2 from the atmosphere over a sustained period. Surface temperatures will remain approximately constant at elevated levels for many centuries after a complete cessation of net anthropogenic CO2 emissions. Due to the long time scales of heat transfer from the ocean surface to depth, ocean warming will continue for centuries**. Depending on the scenario, about 15 to 40% of emitted CO2 will remain in the atmosphere longer than 1,000 years**. {Box 6.1, 12.4, 12.5}

[29] [2021] NSWLEC 92

54. It is not determinative to the question of whether there is an impact, that the scope 3 emissions:

54.1 will be assessed in some other jurisdiction; or

54.2 will be beneath that jurisdictions commitments.

55. The approach adopted in the Ashurst Submission proceeds on the basis of three assumptions that should not be accepted:

55.1 That the coal will be burned in a country that has made relevant commitments. However, Ashurst also assert that there is no way of knowing where the coal will be burnt. Ashurst submit at [37(c)(ii)] in relation to the imposition of condition controlling the marketing of coal:

> it is not compatible with the reality of the global coal trade where coal sales are not always made directly to end users, but also to traders, other producers, third parties and customers who operate in multiple jurisdictions, which means that the destination country is not always known to the mine operator and the mine operator does not have control over the on-selling and distribution of coal once it is exported. Coal might be on-sold and blended multiple times before it reaches its final destination

55.2 That the commitments made by other countries will be achieved. However, there is uncertainty as to the ability of each country to achieve the commitments it has made and there is no certainty that those commitments will stay in place. A proper application of the precautionary principle would be to accept that there is a threat of harm from the scope 3 emissions.

55.3 That the impacts on the world's climate inherent in those commitments and the timing of those impacts is acceptable. The impacts that are locked in to commitments to achieve the Paris Agreement target[30] are a 'better than worse' case compromise. It does not mean that the impacts of the warming even by that amount are not real or are acceptable.

Market substitution argument

56. Ashurst submit at [100] that:

> If the Project is not approved, then there is a real likelihood that demand will be met by coal of inferior quality (in terms of calorific value) than the Project's product coal, which would result in more GHG emissions being emitted globally than if the Project is approved.

57. This has been referred to as the 'market substitution argument'. There are two main flaws in the market substitution assumption: evidentiary flaws and logical flaws.

58. In respect of evidentiary flaws, there is no certainty that there will be market substitution. Ashurst have sought to provide evidence on the demand for coal. However, there is no quantitative evidence specific to this project upon which the IPC can rely. Even if the IPC could be satisfied of the general demand for coal, it is not possible for the applicant to prove that, if the Project is refused, the demand would (in fact) be met by coal of an inferior quality.

59. In our view, there is considerable force in the logic of Justice Preston's reasoning on the market substitution argument in the *Rocky Hill* decision at [538]-[540]:

[30] i.e. holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change, Article 2(1)(a) of the Paris Agreement.

> The market substitution argument is also flawed. There is no certainty that there will be market substitution by new coking coal mines in India or Indonesia or any other country supplying the coal that would have been produced by the Project. As both Professor Steffen and Mr Buckley explained, countries around the world are increasingly taking action to reduce greenhouse gas emissions in their countries, not only to meet their nationally determined contributions but also to reduce air pollution. Mr Buckley listed the energy, climate and environmental policies being implemented in the key countries heavily reliant on coal, including China, India, Japan and South Korea. India, one of the countries in which Dr Fisher suggested market substitution and carbon leakage might occur, has imposed a coal tax on all coal, both thermal and coking coal, and both domestic and imported coal (Buckley report, [106]); introduced controls to deal with chronic and rising air pollution, including new emissions control regulations on its power sector and plans to greatly expand renewable energy capacity (Buckley report, [110]); and launched a Green Power Corridor investment program to build grid transmission capacity for renewable energy projects (Buckley report, [123]).
>
> If approval for the Project in the developed country of Australia were to be refused, on grounds including the adverse effects of the mine's GHG emissions on climate change, there is no inevitability that developing countries such as India or Indonesia will instead approve a new coking coal mine instead of the Project, rather than following Australia's lead to refuse a new coal mine. Developed countries such as Australia have a responsibility, including under the Climate Change Convention, the Kyoto Protocol and the Paris Agreement, to take the lead in taking mitigation measures to reduce GHG emissions (see for example, Article 4(4) of the Paris Agreement and also Urgenda Foundation v The State of Netherlands at [4.79]). Developing countries which are parties to the Climate Change Convention and Paris Agreement also have committed to taking ambitious efforts to achieve a balance between anthropogenic emissions by sources and removal by sinks of GHGs in the second half of this century (Article 4.1) of the Paris Agreement and the long term temperature goal of limiting the increase in global average temperature to well below 2ºC above pre-industrial levels (Article 2 of the Paris Agreement). The parties are required to prepare, communicate and maintain successive nationally determined contributions that they intend to achieve and to pursue domestic mitigation measures with the aim of achieving the objectives of such contributions (Article 4.2 of the Paris Agreement). Each party's successive nationally determined contribution is to reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances (Article 4.3).
>
> Developing countries might consider that domestic mitigation measures to achieve their nationally determined contributions for reducing GHG emissions should include not approving new development for the exploitation or burning of fossil fuel reserves. Developing countries may be encouraged to take such mitigation measures by developed countries taking the lead in doing so in their countries. Hence, there is no certainty that refusal of consent to the Project will cause a new coal mine in another country to substitute coking coal for the volume lost in the open market by refusal of the Project.

60. In respect of the logical or rational flaws in the market substitution assumption, these have been considered in a number of cases.

61. For example, in *Rocky Hill*, Preston stated at [545]:

> There is also a logical flaw in the market substitution assumption. If a development will cause an environmental impact that is found to be unacceptable, the environmental impact does not become acceptable because a hypothetical and uncertain alternative development might also cause the same unacceptable environmental impact. The environmental impact remains unacceptable regardless

> of where it is caused. The potential for a hypothetical but uncertain alternative development to cause the same unacceptable environmental impact is not a reason to approve a definite development that will certainly cause the unacceptable environmental impacts. In this case, the potential that if the Project were not to be approved and therefore not cause the unacceptable GHG emissions and climate change impacts, some other coal mine would do so, is not a reason for approving the Project and its unacceptable GHG emissions and climate change impacts: see Kane Bennett, "Australian climate change litigation: Assessing the impact of carbon emissions" (2016) 33 EPLJ 538 at 546-548; Justine Bell-James and Sean Ryan, "Climate change litigation in Queensland: A case study in incrementalism" (2016) 33 EPLJ 515 at 535.

62. Justice Preston noted in Rocky Hill that the market substitution assumption was rejected in the US in *WildEarth Guardians v US Bureau of Land Management* 870 F 3d 1222 (10th Cir, 2017) where the Court of Appeal said at [1236] that the assumption is irrational (i.e. contrary to basic supply and demand principles). The court held at [1237]-[1238] that:

> it was an abuse of discretion to rely on an economic assumption, which contradicted basic economic principles, as the basis for distinguishing between the no action alternative and the preferred alternative.

63. In our view, the cogent reasoning of Justice Preston in *Rocky Hill* should be adopted. If the IPC finds that the development will cause an unacceptable environmental impact (e.g. on the basis of the greenhouse gas emissions), the environmental impact does not become acceptable because a hypothetical and uncertain alternative development might also cause the same or worse unacceptable environmental impact.

What is the significance of those impacts

64. The Project will emit greenhouse gases as follows:

Table 21 Summary of estimated greenhouse gas emissions

Mining Year	ROM coal (Mt)	Emissions (Mt CO_2-e)		
		Scope 1	Scope 2	Scope 3
2022	7.677	0.625	0.110	17.977
2023	7.140	0.581	0.102	16.760
2024	6.649	0.743	0.095	15.592
2025	10.948	0.829	0.156	25.698
2026	10.901	0.828	0.156	25.465
2027	9.404	0.845	0.134	21.987
2028	10.768	0.872	0.154	25.216
2029	8.958	0.885	0.128	20.890
2030	10.405	0.914	0.149	24.374
2031	8.436	0.875	0.120	19.618
2032	10.271	1.178	0.147	24.094
2033	9.353	1.160	0.134	21.807
2034	8.334	1.356	0.119	19.471
2035	9.379	1.377	0.134	21.805
2036	8.111	1.351	0.116	18.862
2037	9.212	1.471	0.132	21.448
2038	9.225	1.471	0.132	21.418
2039	7.679	1.466	0.110	17.858
2040	8.350	1.480	0.119	19.387
2041	7.550	1.464	0.108	17.558
2042	9.052	0.752	0.129	21.139
2043	6.056	0.956	0.086	14.210
2044	1.273	0.436	0.018	2.986
Average	**8.484**	**1.040**	**0.121**	**19.810**

Note: The Narrabri Mine is approved to mine approximately 170 Mt of ROM coal. The Project (including the approved Narrabri Mine) would involve extraction of approximately 252 Mt of ROM coal (i.e. an increase of approximately 82 Mt relative to the approved Narrabri Mine).

65. The recognised impacts of global warming are significant. While we do not intend to repeat the scientific consensus here, some examples are described in:

65.1 *Sharma* see above at 44.4. Bromberg J describes the impacts as catastrophic:[31]

> … the foreseeable harm, should the risk of harm crystallise, is catastrophic. The consequent harm is so immense …

65.2 *Bushfire Survivors*[32] Preston CJ observes:[33]

> On the evidence, at the current time and in the place of New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and

[31] Sharma [2021] FCA 560 at [257]
[32] [2021] NSWLEC 92
[33] [2021] NSWLEC 92 at [20]

> sufficiently great impact as to be one against which the environment needs to be protected.

66. It is likely to be correct that the impacts attributable to any one source are unable to be shown of themselves to be large. The problem is that there are many, many sources. If it is accepted that no response is required because every source makes a small contribution then no change will occur. The Project will contribute 455.6 Mt CO2-e just in scope 3 emissions. This is not a small or insignificant impact in and of itself. The significance of it can be seen in it making a measurable difference to whatever accounting process is selected. Whether it is the carbon budget approach or the approach based on the assessment of each country's commitments, the amount of GHG emitted will increase the level of carbon in the atmosphere, contribute to global warming and erode the margins by which catastrophic climate change may be avoided. This is a significant impact if only one of many.

The social and economic benefits

67. The Ashurst Submission refers to the social and economic benefits of the Project. These were summarised in its Assessment Report by the Department as follows[34]:

> The Project would provide major economic and social benefits for the Project region and to NSW, including:
>
> • direct capital investment of $404 million (NPV) in the Project;
>
> • continuation of an existing c. 520 jobs at the Narrabri Mine, together with c. 20 new construction jobs during Project development phases;
>
> • estimated net benefit to NSW of up to $599 million (NPV), as reduced by alternative consideration of GHG Scope 1 and 2 cost apportionment;
>
> • direct revenue for the NSW State Government, including more than $259 million in royalties and $177 million in company tax; and
>
> • estimated increase in disposable income of $317 million (NPV) for the 218 workers expected to live in the Project Region;

68. A number of observations can be made about these benefits:

68.1 The estimated net benefit to NSW of up to $590M will be reduced by "alternative consideration of GHG Scope 1 and 2 cost apportionment". DPIE observe[35]: **The apportionment of the full GHG emission costs (including the increase in direct emissions identified in the GGEF) would substantially decrease the Economic Assessment's estimates of a direct benefit to NSW of $599 million (NPV)**.

68.2 The net benefit analysis would be further considerably and adversely impacted if scope 3 emissions were included. The considerations in the Assessment Report appear to have been limited to scope 1 and scope 2 emissions.[36]

68.3 The economic benefits are substantially deferred. DPIE observes[37]:

> Significant local benefits would also arise, firstly through the early creation of an additional (on average)13 high paying FTE jobs but (much more significantly) the

[34] DPIE Assessment Report at xiv
[35] DPIE Assessment Report at [415]
[36] DPIE Assessment Report at [424]
[37] At [425] and at xii

> extension of 370 such FTE jobs from 2034 – 2044, which would lead to significant local expenditure on other goods and services.

Should the development be approved

69. The consideration of GHG emissions does not mandate refusal but it is one of the factors that should be considered.

70. The approach to the assessment of the Project cannot be limited to a traditional cost benefit analysis. Nor can the assessment be reduced to a balance of economic and social benefits on the one hand and environmental costs on the other. This is an approach that both Ashurst and DPIE take. For example DPIE says[38]:

> The Department has carefully weighed the environmental impacts of the Project against the significance of the Project's identified coal resources and the socio-economic benefits associated with continued operation of the Narrabri Mine for a further 13 years (from 2031 until 2044). On balance, the Department believes that the Project's benefits significantly outweigh its residual costs, and that it is in the public interest and is approvable, subject to the recommended conditions.

71. Ashurst says [25]:

> The IPC can be satisfied that the climate change impacts and GHG emissions generated by the Project or the combustion of the Project's coal by other developments do not outweigh the significant social and economic benefits that the Project will deliver at a local, regional and State level (which are addressed in other documents already before the IPC, such as the EIS, Amendment Report and Submissions Report)

72. The objects of the EP&A Act include to protect the environment and also to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment. The principles of ecologically sustainable development are not merely a consideration. They are an important context or framework for assessing the Project in a more integrated manner. This is not to give them primacy or to assert they are the only assessment framework.

73. Ashurst says at [22(f)]:

> the NSW Land and Environment Court has said that the obligation to consider the public interest under s 4.15(1)(e) of the EP&A Act obliges the consent authority to have regard to the principles of ESD in cases where issues relevant to those principles arise.

74. This is supported by the following footnote (7):

> Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256 at [121]-[124], cited with agreement in Minister of Planning v Walker (2008) 161 LGERA 423 per Hodgson J at [42]-[43]. However, the NSW Court of Appeal has been more circumspect at least in respect of decisions under Part 3A of the EP&A Act, stating that the principles of ESD "are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest": Minister of Planning v Walker (2008) 161 LGERA 423 per Hodgson J at [56].

75. The proposition that the Court of Appeal was being more circumspect is very doubtful. The Court is emphasising the fundamental importance of ESD principles: "are likely to come to

[38] DPIE Assessment Report at [503] and at xv

be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest.

76. In *Telstra Corporation Ltd v Hornsby Shire Council* Preston CJ observes[39]:

> …These principles, if adequately implemented, may ultimately realise a paradigm shift from a world in which the development of the environment takes place without regard to environmental consequences, to one where a culture of sustainability extends to institutions, private development interests, communities and individuals: B Boer, "The Globalisation of Environmental Law" (1995) 20 Melbourne University Law Review 101 at 111.
>
> The principles of ecologically sustainable development are to be applied when decisions are being made under any legislative enactment or instrument which adopts the principles: Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources [2004] NSWLEC 122 (7 April 2004) at [178]; and Bentley v BGP Properties Pty Ltd [2006] NSWLEC 34 (6 February 2006) at [57].

77. The observations made by Preston CJ in *Telstra Corporation Ltd v Hornsby Shire Council* [40] in respect of the manner in which when applying the precautionary principle costs and benefits should be considered are worth noting:

> 173 The process of assessment of the risk-weighted consequences of options for precautionary measures has been suggested to involve a form of cost-benefit analysis with risk aversion assumed: see generally, R Posner, Catastrophe: Risk and Response, Oxford University Press, 2004; C Gollier, B Jullien, N Treich, "Scientific progress and irreversibility: an economic interpretation of the 'Precautionary Principle'"(2000) 75 Journal of Public Economics 229; and R v Secretary of State for Trade and Industry; Ex Parte Duddridge, UK Queens Bench Division, Farquharson LJ and Smith J (4 October 1994); (1995) 7 Journal of Environmental Law 224 at 230; [1995] Env LR 151.
>
> 174 However, there are difficulties in the application of the traditional form of cost-benefit analysis used in economics. First, traditional cost-benefit analysis tends to squeeze out qualitative soft values in favour of quantifiable hard values: see L Tribe, "Ways not to think about Plastic Trees: New Foundations for Environmental Law" (1974) 83 Yale Law Journal 1315; and N de Sadeleer, Environmental Principles: From Political Slogans to Legal Rules, Oxford University Press, 2005 at p. 199. This is what occurred in Leatch v National Parks and Wildlife Service (1993) 81 LGERA 270 at 286, where environmental factors were not included in the cost-benefit analysis.
>
> 175 Secondly, traditional cost-benefit analysis has difficulty in correctly internalising all externalities in the context of uncertainty. There are no simple or comprehensive rules in economic analysis for integrating risk and uncertainty into decision-making: see D Pearce, "The Precautionary Principle and Economic Analysis" in T O'Riordan and J Cameron (eds), Interpreting the Precautionary Principle, Earthscan Publications, 1994 at p. 140; and N de Sadeleer, Environmental Principles: From Political Slogans to Legal Rules, Oxford University Press, 2005 at p. 170. There is a difficulty in translating risks into monetary equivalents: C R Sunstein, "Cost-Benefit Analysis and the Environment" (2005) 115 Ethics 351 at 369 and 384; and C R Sunstein, Laws of Fear: Beyond the Precautionary Principle, Cambridge University Press, 2005, pp.7 and 131.

[39] [2006] NSWLEC 133 at [120]-[121]
[40] [2006] NSWLEC 133 at [173]-[176]

> 176 One solution suggested is to combine economic and non-economic measures by way of multi-criteria analysis. Multi-criteria analysis is a tool for integrating different types of monetary and non-monetary decision criteria. It deals with situations where decisions must be made taking into account multiple objectives, which cannot be reduced to a single dimension. Usually, multi-criteria analysis is clustered into three dimensions: the ecological, the economic and the social. Within each of these dimensions certain criteria are set so that decision-makers can weigh the importance of one element in association with other elements. Monetary values and cost-benefit analysis measures can be incorporated as one of the criteria to be considered, and weighted against the other criteria in decision-making: L Emerton, M Greig-Gran, M Kallesoe and J MacGregor, "Economics, the Precautionary Principles and Natural Resource Management: Key Issues, Tools and Practices" in R Cooney and B Dickson (eds), Biodiversity and the Precautionary Principle: Risk and Uncertainty in Conservation and Sustainable Use, Earthscan, 2005, p. 253 at p. 265.

78. The IPC must undertake such a multi-criteria or "polycentric[41]" analysis. Properly considered the exercise needs to include:

78.1 scope 1, 2, and 3 emissions and their impacts (in particular but not limited to in NSW) as described above. These are long term significant impacts;

78.2 the other immediate, medium term and long term impacts of the Project;

78.3 the social impacts of the Project (both positive and negative);

78.4 the economic impact of the Project (both positive and negative).

79. This analysis is not a binary or mathematical exercise but involves a principled multifactorial and integrated consideration of these factors amongst others.

80. For the reasons set out in this letter, what it is not open to the IPC to do is to disregard scope 3 emissions.

81. Once the evaluation has been properly carried out it is open to the IPC to refuse the approval or to grant the approval.

82. However, before that determination is finally made it is necessary to consider whether the Project could be appropriately conditioned to achieve an acceptable outcome[42]. This is discussed below but the point that is immediately relevant is the submission made by Ashurst that a valid condition could not be imposed in respect of the export of the coal or the impacts of scope 3 emissions. While that conclusion is doubtful for the reasons discussed below, if it is correct then this would be a reason for refusing consent. Faced with a significant impact from scope 3 emissions and no way to control, limit or regulate these, an appropriately precautionary approach would be not to approve the Project.

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[41] JK Williams Staff Pty Ltd v Sydney Water Corporation [2021] NSWLEC 23

[42] KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc [2021] NSWCA 216 at [96] The function of determining a development application by granting consent or refusing consent to the application is a single, indivisible function; there is not one power to grant consent and a separate power to refuse consent: *Singh v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 90 ALR 397 at 402; [1989] FCA 737; *GPT Re Ltd v Wollongong City Council* (2006) 151 LGERA 116; [2006] NSWLEC 303 at [47] affirmed in *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450; [2007] NSWCA 171 at [1], [53] and [54]. Equally, the function of determining a development application by granting consent is single and indivisible; there is not one power to grant consent and a separate power to grant consent with such modifications of the proposed development or on such conditions as the consent authority may determine. The consideration of whether or not the consent should be granted with any modification of the development or on conditions is an integral part of the determination of the development application by granting consent.

If so, what conditions ought to be imposed

83. The power to impose conditions of consent is found in s 4.38 of the EP&A Act. It is that provision that governs what conditions may be imposed. The normal principles of statutory interpretation should be applied. That is, that the words used should be given their ordinary or natural meaning read in context and having regard to the purpose of the legislation[43].

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose[44]. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense[45]. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

84. s 4.38 of the EP&A Act says:

> 4.38 Consent for State significant development
>
> (cf previous s 89E)
>
> (1) The consent authority is to determine a development application in respect of State significant development by—
>
> (a) granting consent to the application with such modifications of the proposed development <u>or on such conditions as the consent authority may determine</u>, or
>
> (b) refusing consent to the application.

85. A very broad discretion is given to the consent authority to impose such conditions as it may determine. However, that power is not unconstrained. The ambit of it must be determined by reference to the words read in context and having regard to the purpose of the enactment and having regard to precedent. Care must be taken even when applying much cited decisions such as *Newbury District Council v Secretary for the Environment* to continue to have regard to the context and purpose. Clearly a condition must have a proper purpose and must not be tainted by improper purpose and must fairly and reasonably relate to the development permitted. However, the concept of "relating to the development permitted" is itself a matter of judgement that requires an understanding of the context and nature of the particular application.

86. It is relevant to note that in the *Newbury* decision the developer proposed to use some pre-existing military sheds for storage of synthetic rubber. The permission was granted on condition that the sheds were to be removed by 1972. The developer did not remove the sheds in 1972 and the Secretary sought to enforce the condition. The condition was held to be invalid. The point was that the sheds were pre-existing. The development was storage of synthetic rubber. So the sheds were not a consequence of the development, their demolition therefore did not relate to the development.

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[43] SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34 at [14];
[44] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; [1998] HCA 28; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.
[45] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

87. In respect of the Project, there is no debate that conditions could be imposed on scope 1 emissions. Potentially conditions could be imposed for the purpose of reducing scope 2 emissions as well. The more substantial debate is in respect of scope 3 emissions.

88. Because scope 3 emissions are an impact of the Project then, as a general proposition, a condition in relation to these can be imposed. A particular condition might fall foul of the *Newbury* principles depending on what the condition says.

89. While the power to impose conditions is in s 4.38, some guide to the ambit of that power is found in the objects of the EP&A Act and is the power to impose conditions on development consents generally in s 4.17. The objects of the EP&A Act include as noted above:

> a. to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources (s 1.3(a));
>
> b. to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment (s 1.3(b));
>
> c. to promote the orderly and economic use and development of land (s 1.3(c)); and
>
> d. to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State (s 1.3(i)).
>
> e. to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats"

90. The power to impose conditions on development consents generally is in s 4.17. This section does not apply to the imposition of conditions for SSD developments[46]. However, s4.17 is of assistance in considering the ambit of the power to impose conditions in s 4.38.

91. Relevantly s 4.17 provides:

> 4.17 Imposition of conditions
>
> (cf previous s 80A)
>
> (1) **Conditions—generally** A condition of development consent may be imposed if—
>
> (a) it relates to any <u>matter referred to in section 4.15(1)</u> of relevance to the development the subject of the consent, or
>
> (b)….
>
> (h) …

92. Section 4.15 is of course also applicable to the evaluation of development applications including SSD applications. The matters referred to in s 4.15(1) include:

> (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,

[46] Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd [2021] NSWLEC 110 at [18]

93. The result is a condition under s 4.17 can be within power – would fairly relate to the development - if it was a condition regulating the impact of the development on the environment.

94. So too, when considering the ambit of the power in s 4.38, a condition imposed to mitigate the impacts of the Project on the environment is a condition that can satisfy the *Newbury* test - it is a condition that fairly and reasonably relates to the Project.

95. The Ashurst Submission at [32] refers to a decision by Pain J in f Hunter Environment Lobby Inc v Minister for Planning [2011] NSWLEC 221 as follows:

> Scope 2 emissions are different to scope 1 emissions. By contrast scope 2 emissions result from diesel and electricity use at the project and are not emissions which Ulan can control entirely … [W]hile Ulan can minimise electricity and diesel use at the mine it cannot influence how an electricity generator and supplier chooses to generate the electricity Ulan uses … A condition framed to require offsetting of scope 2 emissions would be open to criticism that to the extent that those emissions are under the control of others, the requirement would not fairly relate to the development [one of the three criteria to be satisfied under the Newbury test for a valid condition of development consent]. It was not clear from the evidence how identifiable those parts of the scope 2 emissions are which Ulan has the ability to minimise or of any other form of control. The incentive for the electricity generator to reduce the production of GHG will also be removed if Ulan has to offset these, a poor policy outcome as identified in the Respondent's submissions.

96. However, Ashurst omit two important statements:

96.1 First, two paragraphs prior to this her Honour says at [82]:

> Offsets for scope 3 emissions are no longer pressed. The GHG emissions released directly and indirectly from the existing and proposed mine as scope 1 and 2 emissions contribute to an environmental impact which has local, regional and global impacts. As the purpose of the EPA Act includes the protection of the environment, the imposition of conditions to address GHG which are attributable to the project under Pt 3A are arguably within power.

The importance of this is that her Honour was not concerned with scope 3 emissions because they were no longer pressed.

96.2 Second, at the end of paragraph [94] Ashurst omit the following statement:

> I do not therefore consider it necessary to determine whether offsets in relation to scope 2 emissions are lawful as I do not intend to impose conditions requiring these for the reasons identified in this paragraph.

97. What is apparent is that her Honour in paragraph [94] is not dealing with scope 3 emissions but only scope 1 and 2 and in that context is merely referencing submissions made and then concluding that it is not necessary to decide one way or another. It cannot be said that her Honour has expressed an opinion or adopted any particular logic.

98. That said, to the extent that the submission is made by Ashurst that the IPC ought to accept:

98.1 That “a condition framed to require offsetting of scope 2 emissions would be open to criticism that to the extent that those emissions are under the control of others, the requirement would not fairly relate to the development”, that statement is not made in respect of scope 3 emissions which are an impact of the Project; and

98.2 That “the incentive for the electricity generator to reduce the production of GHG will also be removed if Ulan has to offset these”, again this is about scope 2 not scope 3 and is doubtful. The electricity generator would remain incentivised through its own accounting of its emissions to offset them both in the public interest and if there were an applicable trading scheme. In any event as Ashurst also state there is no certainty that the coal will ultimately be burned in a country that has offsets or similar policy settings[47].

99. Ashurst says at [33] “It stands to reason that, if Justice Pain's logic in [94] is accepted (which it should be), it would be invalid to impose conditions of development consent on the SSD Submission to the Independent Planning Commission consent for the Project which requires offset of Scope 2 or of Scope 3 GHG emissions, which may be even further beyond the control of the Applicant than Scope 2 GHG emissions.” However, the touchstone for both the validity and the utility of a condition requiring the offsetting of scope 2 or 3 emissions is not the ability to control them, it is the fact that these emissions are impacts of the Project. Those impacts can be offset and a condition requiring this would fairly relate to the Project. In any event the considerations relevant to scope 2 emissions (in Australia by and large) and scope 3 emissions (by and large in unknown overseas jurisdictions) are different.

100. At [36(c)] Ashurst says: “it would be unlawful for a condition of consent to be imposed for the Project requiring offset of Scope 3 GHG emissions, because it would breach the Newbury tests for a valid condition of development consent”. For the reasons set out in these submission this statement at that level of generality is wrong.

101. At [36(d)] Ashurst says: “the position in paragraph 36.c above will be codified by the Environmental Planning and Assessment Amendment (Territorial Limits) Bill 2019 (NSW) (Territorial Limits Bill), which, if enacted, will prohibit conditions of consent imposed for the purpose of achieving objectives relating to the impacts occurring outside Australia as a result of the development, or the impacts occurring in NSW as a result of development carried out outside Australia. The Minister for Planning in his second reading speech for the Bill said that the Bill is "consistent with the well-defined Newbury test for conditions of consent and the development of case law in line with the Newbury Principles". A number of observations can be made about this:

101.1 First, the Territorial Limits Bill has not been enacted – it is not law;

101.2 Second, the fact that the Government has seen fit to introduce the Territorial Limits Bill lends credence to the view that a condition could be imposed under the current law requiring offsetting of scope 3 emissions – otherwise there would be no need for the Bill;

101.3 Third, the paragraph recognises that the contribution of scope 3 emissions to global warming overseas can be characterised as “the impacts occurring in NSW as a result of development carried out outside Australia”.

102. At [37] Ashurst submit that it would be unlawful for the IPC to impose an export control condition because it would offend the *Newbury* test – this is wrong at that level of generality for the reasons we have stated already – and because “the Commonwealth Government has comprehensively regulated the topic of foreign exports and the countries to which certain goods may lawfully be exported by reference to international treaty obligations. This is reflected in the detailed regime of the *Customs Act* 1901 (Cth) and other legislation.” This second proposition is also doubtful. The Commonwealth has not legislated so as to “cover the field” of the marketing of coal to overseas entities. The *Customs Act* in particular does not do this – it regulates import and export (physical movement) and so far as coal is concerned is largely silent.

103. Ashurst submit at [37(c)(i)] that it would be inefficient and inequitable to impose export control conditions only on new projects, not existing ones (existing consents could only be modified at the request of the proponent). This submission should be rejected. The control

[47] See Ashurst submissions at [37(c)(ii)]

of greenhouse gas emissions is urgent and the failure to regulate it in the past is not a reason for continuing to fail to do so.

104. Ashurst submit at [37(c)(ii)] that such a condition:

> it is not compatible with the reality of the global coal trade where coal sales are not always made directly to end users, but also to traders, other producers, third parties and customers who operate in multiple jurisdictions, which means that the destination country is not always known to the mine operator and the mine operator does not have control over the on-selling and distribution of coal once it is exported. Coal might be on-sold and blended multiple times before it reaches its final destination

105. If that submission is accepted, then it undermines any proposition that the coal will be used only in countries that have signed onto and enforce meaningful commitments to reduce greenhouse gas emissions. The submission is an admission that the proponent does not know where or how the coal will be used. In this situation a precautionary approach would be to require that the emissions be offset.

Yours faithfully

[redacted]

Patrick Ibbotson
Partner