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Legal obligations for environmental impact assessment in coal mining approvals in New South Wales

Authors

Prepared by the Hon John Basten KC, Honorary Professor, UNSW Law & Justice, assisted by Gillian Moon, Senior Visiting Fellow, UNSW Law & Justice.

About this report

The Australian Climate Accountability Project commissioned this report into the assessment by NSW government agencies of impacts of greenhouse gas emissions in applications to approve new or expanded coal mines in the state.

About the Australian Climate Accountability Project

The Australian Climate Accountability Project is a world-first research project tackling Australia's fossil fuel exports, our biggest contribution by far to the climate crisis. Housed at the UNSW Australian Human Rights Institute, a global leader in applied human rights research, the Australian Climate Accountability Project has a track record of driving high-impact multidisciplinary research to hold governments and corporations accountable for climate harms.

Contact Us

Australian Human Rights Institute:

<https://www.humanrights.unsw.edu.au/>
humanrights@unsw.edu.au

Australian Climate Accountability Project:

<https://www.humanrights.unsw.edu.au/research/australian-climate-accountability-project>
acapteam@unsw.edu.au

The Australian Climate Accountability Project is located on the unceded territory of the traditional owners, the Bidjigal people.

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Legal obligations for environmental impact assessments in coal mining approvals in New South Wales

The Australian Climate Accountability Project has commissioned a report in relation to issues concerning impact assessments of applications to open new, and expand existing, coal mines in New South Wales (“NSW”). An application for such purposes will constitute a State significant development under NSW planning laws and will require approval from the Independent Planning Commission of NSW (“IPC”). The IPC will determine an application by applying relevant State laws and environmental planning policies; this exercise will not engage federal legislation or policies, except to the extent they are picked up by NSW law. Absent a decision by the Commonwealth Environment Minister that the limited provisions of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) are engaged, no issue of federal law will arise.

A ISSUES

The request noted the potential significance of the recent decision of the NSW Court of Appeal in *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd*¹ (“*Denman*”). However, as with any judicial decision, the reasoning in that judgment was responsive to the way the arguments were presented to the Court. Those arguments were, in turn, constrained by the way the case had been run before the primary judge. The judgment was an appeal from a judicial review in the Land and Environment Court of a decision of the IPC, which had considered an application for the extension of an existing mining tenement for a further 22 years. The application had been made and determined (favourably to the proponent) in 2022. The case therefore applied the legal framework as it existed in 2022. This Report draws upon both factual material and legal principles which were not relied on, and in some cases were not available, at the time of the IPC determination.

The following commentary is not intended as a reflection on the way that case was argued or determined, but rather provides a perspective as to how such cases may be addressed in the future. Further, it should be noted that both scientific and legal analyses are in a process of elucidation and some issues which may be considered speculative or unresolved today may be accepted or resolved in the near future.

An apparent curiosity of *Denman* is that the Court rejected a challenge to the IPC's consideration of the global effects of the estimated 876 Mt CO₂e over the life of the project (the mine expansion) but upheld a challenge to the failure to consider the local effects.

¹ [2025] NSWCA 163. Special leave to appeal to the High Court was granted on 3 December 2025; at the time of writing the hearing of the appeal had not occurred.

The proponent's environmental impact statement acknowledged "that (subject to the efficacy of national and international greenhouse gas abatement measures) all sources of greenhouse gas emissions will contribute in some way towards the potential global, national, state and regional effects of climate change".² The environmental impact statement ("EIS") also acknowledged:³

Due to the inherent uncertainties associated with the climate change projections described in Sections 5.1 to 5.3, the potential impacts of climate change on the Project cannot be determined with a high degree of confidence.

Notwithstanding, the projections presented in Sections 5.1 to 5.3 indicate average temperatures are likely to rise in the Project area, and extreme temperature events may increase in frequency. This suggests that bushfire activity may become more prevalent in the region.

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

...

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

There was therefore unchallenged evidence of climate impacts in the "locality" of the project, however that term was defined. As will be noted below, the IPC was obliged to consider "significant likely impacts of that development, including ... social and economic impacts in the locality." This, the Court of Appeal held, the IPC had failed to do.

There is, of course, no necessary incoherence in the rejection of the challenge to global effects and acceptance of the failure to consider local impacts. However, absent relevant concessions, it might have been thought necessary for the IPC to make more precise findings as to the acknowledged effects on the global climate system, if only to assess the significance of those effects locally. More importantly, as this Report seeks to explain, the IPC is legally required to take into account the global effects of new coal mines (or extended operations of existing mines) at a time when overseas demand is expected to fall and Australia can no longer reject responsibility for the consequences to the world's climate system of decisions to increase (rather than reduce) production of fossil fuels.

² See *Denman* at [158].

³ See *Denman* at [156]-[157].

B LEGAL PRINCIPLES – NSW

(1) *Planning Act, s 4.15*

First, there is the statutory context. The development approval in *Denman* was considered by reference to the general principles set out in the *Environmental Planning and Assessment Act 1979* (NSW) (“Planning Act”). That in turn picked up cl 2.20 of Chapter 2 of the State Environmental Planning Policy (Resources and Energy) 2021 (NSW) (“Mining SEPP”). It is necessary to have regard also to the paramount principles in the *Climate Change (Net Zero Future) Act 2023* (NSW) discussed below but which could not be raised in *Denman*, having post-dated the IPC determination in that case.

Starting with the Planning Act, s 4.15(1), the relevant paragraphs now read as follows:

4.15 Evaluation

- (1) **Matters for consideration—general** In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application--
- (a) the provisions of--
 - (i) any environmental planning instrument, ...
 - ... that apply to the land to which the development application relates,
 - (b) the significant likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
 - ...
 - (e) the public interest.

In 2025, that is after the IPC decision in *Denman*, the word “significant” was inserted before “likely” in par (b).⁴ However, the amendment is unlikely to affect the operation of the provision: the Land and Environment Court has routinely read down the literal unconstrained meaning of “impacts” to those which alone or in combination with others could affect the outcome of the particular application. Indeed, that reading is inherent in the reference in the chapeau to “matters ... of relevance to the development”.

The 2025 amending Act also revised the objects of the Planning Act: s 1.3(e) now reads: “to promote resilience to climate change and natural disasters through adaptation, mitigation, preparedness and prevention”. The whole Act must now be construed bearing this object in mind. Further objects now include (i) “to facilitate ecologically sustainable

⁴ *Environmental Planning and Assessment Amendment (Planning System Reforms) Act 2025* (NSW), Sch 1, [63], [64].

development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment” and (j) “to promote a proportionate and risk-based approach to environmental planning and assessment”.

Aspects of the statutory language of s 4.15 support a constrained interpretation of the listed factors. For example, it is perhaps unlikely that in 1997, when the predecessor to s 4.15, namely s 79C, was enacted,⁵ the drafter, referring to “environmental impacts”, had in mind the global climate system.⁶ That inference is supported by the terms in which examples, intended to be expansive, are expressed, such as “both the natural and built environments”. A similar inference may be drawn from the phrase “in the locality”, which limits the scope of the phrase “social and economic impacts”. The “localising rule” in s 12 of the *Interpretation Act 1987 (NSW)*, which provides an assumption that matters and places in legislation refer to those in NSW, might also support a confined operation, although a sufficient connection with NSW is found in the application of the Planning Act to use of land in New South Wales.

It appears that submissions in *Denman* treated the first phrase (“in the locality”) as qualifying the reference to “natural and built environments”, although the absence of a comma after “social and economic impacts” must cast doubt on that construction.⁷ Even if that construction were accepted, the phrase can only refer to the examples following “including” and not to the primary description of the criterion, namely “the significant likely impacts of that development”. While the words of confinement do not condition the scope of the criterion, they do give a particular flavour to the circumstances in the drafter's mind.

However, other considerations limit the weight to be given to that factor. First, the generality of the language readily permits a broader connotation to cater for changed circumstances. The common meaning of environment is both broad and elastic. In *The Crown v Murphy*, the High Court observed:⁸

In its ordinary meaning “environment” signifies that which surrounds and has long been understood to include “the conditions under which any person or thing lives”: *Oxford English Dictionary*, 2nd ed. (1989). The latter usage dates from 1827 when Thomas Carlyle used the word to mean “the aggregate of external circumstances, conditions, and things that affect the existence and development of an individual, organism, or group”. See Hendrickson, *The Encyclopedia of Word and Phrase Origins*, (1987).

The elasticity of the concept is illustrated by its application in *Murphy* with respect to a turtle rookery:

⁵ *Environmental Planning and Assessment Amendment Act 1997 (NSW)*, Sch 1 [32].

⁶ Which is not to say that planners were unaware of climate change at that time.

⁷ *Denman* at [5], a fact that limits the sufficiency of some of the reasoning in the judgment.

⁸ (1990) 64 ALJR 593, 596-597; [1990] HCA 42.

Even taking the narrowest possible meaning of the word "environment" and confining it to the immediately adjacent land, the resumed land was and is environed by land which turtles used and continue to use as a rookery. Any use of the resumed land which, directly or indirectly, reduced the number of turtles using the adjoining coastal strip as a rookery or the number of surviving hatchlings would effect an alteration of a feature of that coastal strip and, hence, an alteration of the environment of the resumed land. ... [A]ny reduction in the number of turtles using that land as their rookery or in the number of surviving hatchlings might properly be thought to constitute a deleterious impact on the environment of the resumed land.

Secondly, both airborne and water pollution were well-known environmental problems in 1997, with potentially widespread effects which constituted environmental impacts. Impacts on the atmosphere, groundwater or riverine systems can clearly be geographically extensive and will depend on the nature of the proposed development. It follows that a word like "locality" should not be given a confining operation. Thirdly, because par (b) requires consideration of "the significant likely impacts of the development", the statement of included categories should not constrain the breadth of the stated criterion. Rather the included categories are examples which confirm in particular respects the intended breadth of the factors to be considered. Fourthly, the reference in the updated objects to resilience to climate change, including by way of mitigation, denies the basis for an implication reading down the language of s 4.15.

Finally, it should be noted that the consideration of what is a "likely" impact is not confined to an impact which can be identified in precise terms or can be described as probable, but includes that of which there is a "real chance".⁹ The correctness of that approach is confirmed by the inclusion of the object of promoting a "risk-based approach to environmental planning and assessment".¹⁰

Two more general observations should be made with respect to s 4.15. The first concerns the final mandatory consideration, namely the "public interest". The breadth of this concept is self-evident: its inclusion not only provides a basis for a wide range of mandatory considerations, but also indicates that the other listed matters should not be narrowly construed. At least in some cases, the IPC appears to have treated this criterion as describing the balancing exercise required by the section. Thus, in considering a coal mine proposed for the Bylong Valley in the Hunter region it identified its approach in the following terms, as described in the Court of Appeal judgment:¹¹

⁹ See *Randwick Municipal Council v Crawley* (1986) 60 LGRA 277 at 279-281; *Drummoyne Municipal Council v Maritime Services Board* (1991) 72 LGRA 186 at 193, applied by the Court of Appeal in *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349 at [46], and in *Denman* at [210].

¹⁰ Planning Act, s 1.3(j).

¹¹ *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216; (2021) 250 LGERA 39 at [10].

Section 6.17 in the reasons [of the IPC] dealt with the “public interest”. In 6.17.5, the Commission identified the economic and social benefits while the mine was operational, based on its findings as to the economic assumptions: par 798. It then turned to the negative impacts which were identified in the following terms:

799 The Commission considers that the negative impacts of the Project include the:

- impact on the aesthetic, scenic, heritage and natural landscape significance of the Bylong scenic landscape ...;
- impacts on the heritage values of Tarwyn Park ...;
- contribution towards climate change through GHG emissions ...;
- the likelihood that impacted productive agricultural land will not be rehabilitated to BSAL-equivalent standard post-mining, resulting in the permanent loss of BSAL in the Bylong Valley ...; and
- long-term impacts on the groundwater

The second observation concerns the obligation to “consider” the listed matters. A particular development proposal may raise a range of issues, each of which invites its own weight in a balancing exercise. Generally, “weight” will be a matter for the consent authority, but a reviewing court will intervene if the course taken by the consent authority is outside the bounds of what could be considered reasonable in the context of the particular proposal. But the lack of guidance as to how to conduct the weighing exercise has been noted by the IPC. In *KEPCO Bylong* the IPC dealt with climate change in the following passage:

696 The Commission accepts that the Recommended Revised Project will slightly reduce the GHG emissions compared to the Project The Commission notes that the Applicant has committed to develop an Energy and Greenhouse Gas Management Plan which will set out measures to minimise GHG emissions from the Project The Commission notes that these measures appear to relate only to Scope 1 and 2 GHG emissions. The Commission is therefore of the view that the Applicant has not minimised Scope 1, 2 and 3 GHG emissions to the greatest extent practicable as required under Clause 14(1)(c) of the Mining SEPP. The Commission also notes that there are no offset measures proposed in either the Project or Recommended Revised Project from the Applicant.

697 The Commission accepts that there is no policy guidance on what constitutes an acceptable, unacceptable or substantial amount of GHG emissions. Nonetheless, the Commission concludes that based on the evidence ... there will be a contribution to global GHG emissions that needs to be considered by the Commission.

If no reasons are given or the reasoning with respect to a required consideration is inadequate, an inference that the consent authority acted unreasonably may be drawn from an assessment of the result against the material before the authority. Where, as is usually the case with major developments, there are extensive reasons, the inference of legal unreasonableness may be drawn from those reasons. However, it is usually helpful

for the court to consider both forms of challenge: that is because a decision-maker, especially one having a member or an adviser who is a lawyer, should be able to write a formally coherent set of reasons which will tick all the boxes. In *Denman*, that happened with respect to the global consideration of scope 3 emissions, although, for reasons set out below, the IPC consideration in that respect could now be seen as flawed.

What constitutes sufficient consideration of mandatory factors will vary according to the material involved; as Gibbs J explained in *Buck v Bavone*,¹² a case concerning a condition of validity turning on the state of satisfaction of the decision-maker as to specified criteria. After identifying the particular grounds of review, Gibbs J continued:

Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.

However, as Mason CJ explained in *Peko-Wallsend*,¹³ the preferred conceptual basis for such review is “unreasonableness”; it was characterised as failing to give adequate weight to a relevant factor of great importance or giving excessive weight to a relevant factor of no great importance. The relative importance of the consideration may need to be inferred from the subject matter, scope and purpose of the legislation.

A similar expression commonly used in relation to mandatory considerations in place of “take into consideration” is “have regard to”: indeed, it is the language used in the Mining SEPP, cl 2.20(2). As explained by Sackville J in *Singh v Minister for Immigration and Multicultural Affairs*:¹⁴

[A] statutory obligation to have regard to specified matters when making an administrative decision may require the decision-maker to take the matters into account and “give weight to them as a fundamental element in making his [or her] determination”: *R v Hunt; Ex parte Sean Investments Pty Ltd* [1979] HCA 32; (1979) 180 CLR 322 at 329 per Mason J. ... But the phrase “have regard to” can simply mean to give consideration to something (*Shorter Oxford English Dictionary*). In this sense a direction to a decision-maker to have regard to certain factors may require him or her merely to consider them, rather than treat them as fundamental elements in the decision-making process.

¹² *Buck v Bavone* (1976) 135 CLR 110, 118-119; [1976] HCA 24.

¹³ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40; [1986] HCA 40.

¹⁴ (2001) 109 FCR 152; [2001] FCA 389 at [57]; approved by the Full Court in *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248; [2010] FCAFC 145 at [61].

An assessment of the sufficiency of the consideration of a particular matter by the decision-maker should have regard to the distinctions between fact-finding, identification of relevant principles, and the application of those principles to the facts as found. With a development proposal such as a coalmine, often little will turn on primary facts. Thus, the nature and scope of the proposal will usually be a given, as in *Denman*. In the Court of Appeal, the respondent proponent had submitted:¹⁵

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

(2) *Planning Act – consent authority*

Generally, the consent authority for coal mine developments will be the Independent Planning Commission (“IPC”). Relevantly for present purposes it has “the functions of the consent authority under Part 4 for State significant ... development ... (subject to this Act)”: s 2.9(1). State significant development is dealt with in Pt 4.7 of the Planning Act and includes that declared to be such by a “State environmental planning policy”: s 4.36(2). The State Environmental Planning Policy (Planning Systems) 2021 (NSW), declares coal mining to be State significant development.¹⁶

The IPC is a corporation constituted as a “NSW Government agency” under s 2.7 of the Planning Act. It is not subject to direction or control by the Minister, except for directions in relation to the time for the exercise of its functions: Planning Act, s 9.1. However, the Planning Secretary exercises specified procedural and ancillary functions on behalf of the IPC, including “undertaking assessments of the proposed development and providing them to the Commission (but without limiting the assessments that the Commission may undertake)”: s 4.6(b). As a result, the IPC always has the Department’s assessment before it in undertaking its functions. That assessment will be based on certain policy documents and the contemporary departmental understanding of the IPC’s functions. These will be discussed below.

¹⁵ *Denman* at [60].

¹⁶ Planning Systems SEPP, Pt 2.2 (cl 2.6(1)) and Sch 1, cl 5(1).

(3) Mining SEPP

Chapter 2 of the State Environmental Planning Policy (Resources and Energy) 2021 (NSW) (“Mining SEPP”) deals with “Mining, petroleum production and extractive industries”. Clause 2.20 provides:¹⁷

2.20 Natural resource management and environmental management

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

A number of features of this provision are evident and important. First, there is an appearance of incoherence in sub-cl (1) in requiring the consent authority to consider the imposition of conditions to “ensure” that GHG emissions are “minimised”: the primary, if not the singular, purpose of mining coal is to create GHG emissions by the burning of the extracted coal. This suggests that sub-cl (1) is directed primarily to scope 1 and scope 2 emissions. In any event, it does not limit the matters to be considered by the consent authority in considering an application. Secondly, sub-cl (1) may be contrasted with sub-cl (2), the latter imposing a freestanding obligation, in determining the application, to consider an assessment of scope 3 emissions (“downstream emissions”).¹⁸ Thirdly, the authority shall do so “having regard to” both State and national “policies, programs or guidelines”.

¹⁷ Its predecessor, State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW), cl 14, was in the same terms.

¹⁸ The same requirement arose under the predecessor to the current SEPP, namely the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW), cl 14, discussed in *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216; (2021) 250 LGERA 39.

For reasons explored further below, it is apparent that the direction given to the IPC by cl 2.20 of the Mining SEPP is incomplete, unclear and outdated. Importantly in this context, the Planning Secretary has a statutory obligation to “keep State environmental planning policies ... under regular and periodic review for the purpose of ensuring that the objects of this Act are, having regard to such changing circumstances as may be relevant, achieved to the maximum extent possible”.¹⁹ That obligation calls for immediate attention to this part of the Mining SEPP.

It is clearly important that the consent authority have guidance as to how to weigh the matters it is required to address under s 4.15 of the Planning Act and under cl 2.20 of the Mining SEPP. Given the indivisible global effects of emissions on the climate system, for which not only NSW bears responsibility, it is logical to require the state authority to have regard to national, as well as local, policies, programs and guidelines. Before addressing the nature and content of the applicable policies, it is necessary to set out the other statutory provisions governing the activities of the NSW consent authority.

(4) *Climate Change (Net Zero Future) Act 2023 (NSW)*

The legislative scheme

The *Climate Change (Net Zero Future) Act 2023 (NSW)* (“Net Zero Act”) commenced on 11 December 2023. It was not in force when the IPC made the determination reviewed in *Denman*,²⁰ but its effect may require reconsideration of aspects of the reasoning of the IPC in that and other cases. Given the novelty and importance of the Act, key provisions should be set out.

The Act provides statements of its purposes and objects and states “guiding principles”, in the following terms:

3 Purpose of Act

- (1) The purpose of this Act is to give effect to the international commitment established through the 2015 Paris Agreement to—
 - (a) hold the increase in the global average temperature to well below 2°C above pre-industrial levels, and
 - (b) pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, and
 - (c) increase the ability to adapt to the adverse impacts of climate change.
- (2) The Parliament of New South Wales, in enacting this Act, recognises—
 - (a) there is a scientific consensus that human activity is causing abnormal changes to the climate, and

¹⁹ Planning Act, s 3.21(1).

²⁰ Because *Denman* was an appeal from a judicial review proceeding in the Land and Environment Court of a decision made on 6 September 2022, the later Act had no application.

- (b) action is urgently required to reduce greenhouse gas emissions and to address the adverse impacts of climate change.
- (3) The Parliament of New South Wales, in enacting this Act, is committed to effective action on climate change to ensure a sustainable and fair future for the people, economy and environment of New South Wales.

4 Objects of Act

The objects of this Act are as follows—

- (a) to establish guiding principles for action to address climate change,
- (b) to set targets for the reduction in net greenhouse gas emissions in New South Wales until 2050,
- (c) to set an objective for New South Wales to be more resilient to a changing climate,
- (d) to establish the Net Zero Commission to independently monitor, review and report on progress in New South Wales towards the targets, the adaptation objective and other matters.

...

8 Guiding principles

- (1) For this Act, the **guiding principles** are the principles set out in this section.
- (2) There is a critical need to act to address climate change, which is a serious threat to the social, economic and environmental wellbeing of New South Wales.
- (3) Action to address climate change should be taken as early as possible to minimise the cost and adverse impacts of climate change.
- (4) Action to address climate change should be taken in a way that—
 - (a) is fiscally responsible, and
 - (b) promotes sustainable economic growth, and
 - (c) considers the economic risks of delaying action to address climate change, and
 - (d) considers the impact on rural, regional, and remote communities in New South Wales.
- (5) Action to address climate change should be consistent with the right to a clean, healthy and sustainable environment.
- (6) Action to address climate change should be consistent with the principles of ecologically sustainable development described in the *Protection of the Environment Administration Act 1991*, section 6(2).
- ...
- (8) Action to address climate change should take into account the following—
 - (a) the knowledge and perspectives of Indigenous communities,
 - (b) the best available science,
 - ...
 - (h) the need to reduce the risk climate change poses to human health,
 - ...
 - (j) the need to reduce the risk climate change poses to the survival of all species.

- (9) Action to address climate change should take into account the impact on animals.
- (10) The Government of New South Wales is responsible for—
 - (a) urgently developing and implementing strategies, policies and programs to address climate change, and
 - (b) ensuring the Government of New South Wales pursues best practice in addressing climate change.

The widely used term “action to address climate change” is defined in s 5 inclusively:

action to address climate change includes—

- (a) action to mitigate climate change by reducing—
 - (i) greenhouse gas emissions, and
 - (ii) greenhouse gases in the atmosphere, for example, through sequestration or sinks, and
- (b) action to adapt to a changing climate and to address the effects of climate change.

Importantly, the Act includes its own paramountcy provision:

7 Relationship with other Acts and laws

This Act prevails to the extent of an inconsistency with another Act or law.

The Act fixed emission reduction targets for emissions in NSW: these do not require consideration here. The most significant effects of the Act for present purposes are fourfold. First, it requires the establishment of policy documents by Government departments and agencies. Prior to commencement of the Net Zero Act, a document produced by the NSW Environment Protection Authority was challenged in Court and found to be legally inadequate. Secondly, it aligns State policy with the temperature goals and adaptation commitments in the Paris Agreement which has important consequences with respect to the operation of international law principles in NSW. Thirdly, it expressly recognizes the “the right to a clean, healthy and sustainable environment”, and requires action to address climate change to be “consistent with” this widely recognised human right. (The content of this right will be briefly discussed below.)

Fourthly and separately, the Act establishes a body corporate known as the Net Zero Commission, the functions of which set out in s 15(1) include:

- (c) to monitor and review action currently being taken in New South Wales to address climate change, including—
 - (i) the environmental, social and economic impacts of the action, and
 - (ii) action related to the strategies, policies and programs of the Government of New South Wales,

- (d) to identify and recommend action that should be taken by the Government of New South Wales to address climate change, including strategies, policies and programs that should be implemented by the Government

Specifically, the Commission is empowered to “provide advice and make recommendations to” the IPC and to the Secretary of a Department: s 15(3). In September 2025 the Commission produced a “Spotlight Report” report on coal mining in NSW, which will be discussed below.

Operation of the “guiding principles”

The “guiding principles” established by s 8 operate in two ways. While they are described as the principles “[f]or this Act”, which superficially has a limiting effect, in fact they operate broadly across State Government functions. First, with respect to the Net Zero Commission itself, the guiding principles are engaged in relation to the Commission’s function of monitoring and reviewing “action currently being taken in New South Wales to address climate change”. That is, the Commission must review the Government’s action (and by necessary implication, inaction) by reference to the guiding principles.

Secondly, there is the oddly placed s 8(10), which makes the Government as a whole “responsible for” developing and implementing strategies and policies, amongst other things, “to mitigate climate change by reducing ... greenhouse gas emissions”.²¹ This is not so much a guiding principle as a statement of the institutional framework within which the guiding principles operate: it could hardly have been more broadly stated. That is consistent with the explicit purpose of the Act: it would have been incoherent and ineffective to establish a Commission to monitor and review government activities against standards which the relevant government departments, agencies and officers were not bound to follow.

Consistently with this understanding, a NSW Government website, titled NSW Climate and Energy Action, states that the Net Zero Act “enshrines whole-of-government climate action to deliver net zero by 2050” and helps by “setting out a clear policy framework to 2050, consistent with the Paris Agreement to keep global temperature rise well below 2 degrees and avoid the worst impacts of climate change”. This confirms the NSW Government policy of substantially reducing or phasing out coal mining in NSW, as the Net Zero Commission envisages.

This position on policy is not new: when *KEPCO Bylong* was decided in 2018, a relevant policy document was titled the “NSW Climate Change Policy Framework”; it stated that

²¹ Section 8(1) does not say that all of the section comprises guiding principles, but only that the guiding principles “are the principles set out in this section”.

The NSW Government endorses the Paris Agreement and will take action that is consistent with the level of effort to achieve Australia's commitments to the Paris Agreement.

That Policy has been given statutory force by the Net Zero Act, which was passed with the support of both major parties.

Those matters, taken in combination with the paramountcy of the Net Zero Act to the extent it is inconsistent with other legislation or the general law, oblige the Department of Planning, its Minister and Secretary, and consent authorities under the Planning Act (including the IPC) to act in conformity with the guiding principles. Whether that is happening will be considered below.

Right to a healthy environment

While it is necessary to read the guiding principles as interdependent and coherent, separate reference should be made to the obligation for State government action to be consistent with the right to a clean, healthy and sustainable environment. This factor should be read with “the need to reduce the risk climate change poses to human health”.

In 2024 the ACT legislated to include the right to a clean, healthy and sustainable environment in its *Human Rights Act 2004* (ACT), s 27C. There is as yet no domestic judicial consideration of this right, nor its interaction with other legislated or general law human rights. However, there has been significant international recognition of the relevance of this right to measures to address climate change. In 2020, the UN Special Rapporteur on Human Rights and the Environment noted that the right was explicitly included in regional treaties ratified by 126 States and legally recognised by 80% of the member States of the UN.²² In 2022, the UN General Assembly passed a resolution recognizing the human right to “a clean, healthy and sustainable environment” and identifying climate change as one of the most serious threats to the right.²³ It has been held in a number of international and national cases²⁴ to impose positive obligations on States to adopt more ambitious goals in reducing GHG emissions.

(5) Planning Regulation

In NSW, a proponent for a new or extended coal mine must prepare an EIS; the Planning Act does not prescribe what it should include. The content is prescribed by the Environmental Planning and Assessment Regulation 2021 (NSW) (“Planning

²² UN Special Rapporteur on Human Rights and the Environment, (A/HRC/43/53), [10] & [13].

²³ United Nations, Resolution adopted by the General Assembly on 28 July 2022: A/RES/76.300.

²⁴ *Inter-American Court of Human Rights, Advisory Opinion OC-32/25* (May 29, 2025, (Climate Emergency and Human Rights), Series A No. 32; *Do-Hyun Kim v South Korea* (2020Hun-Ma389; Constitutional Court of Korea, Aug. 29, 2024); *Held v Montana*, (Mont 1st Dist Ct; Aug. 14, 2023); upheld on appeal: *Held v State of Montana*, 2024 MT 312 (Mont 2024).

Regulation”).²⁵ Section 192(1)(f) of the Regulation requires a statement of “the reasons justifying the carrying out of the development, activity or infrastructure, considering biophysical, economic and social factors, including the principles of ecologically sustainable development set out in section 193.” Section 193 states:

193 Principles of ecologically sustainable development

- (1) The principles of ecologically sustainable development are the following—
 - (a) the precautionary principle,
 - (b) inter-generational equity,
 - (c) conservation of biological diversity and ecological integrity,
 - (d) improved valuation, pricing and incentive mechanisms.
- (2) The precautionary principle is 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.
- (3) In applying the precautionary principle, public and private decisions should be guided by—
 - (a) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
 - (b) an assessment of the risk-weighted consequences of various options.
- (4) The principle of inter-generational equity is that the present generation should ensure the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.
- (5) The principle of the conservation of biological diversity and ecological integrity is that the conservation of biological diversity and ecological integrity should be a fundamental consideration.
- (6) The principle of improved valuation, pricing and incentive mechanisms is that environmental factors should be included in the valuation of assets and services, such as—
 - (a) polluter pays, that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement, and
 - (b) the users of goods and services should pay prices based on the full life cycle of the costs of providing the goods and services, including the use of natural resources and assets and the ultimate disposal of waste, and
 - (c) established environmental goals 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

²⁵ Planning Regulation, Pt 8 “Infrastructure and environmental impact assessment”, Div 5 “Environmental impact statements”.

minimise costs to develop their own solutions and responses to environmental problems.

The Planning Regulation states principles which are important, but it makes no reference to potentially significant climate change harms which may be a consequence of the proposal going ahead. Part 5 of the Planning Act (and regulations under it) provide details of environmental factors to be considered in relation to developments for which approval under Pt 4 is not required and thus do not apply to coal mines.²⁶ However, the default list of “environmental factors” in the Regulation is instructive:

- (2) If there are no environmental factors guidelines in force, the determining authority must take into account the following environmental factors—
 - (a) the environmental impact on the community,
 - (b) the transformation of the locality,
 - (c) the environmental impact on the ecosystems of the locality,
 - (d) reduction of the aesthetic, recreational, scientific or other environmental quality or value of the locality,
 - (e) the effects on any locality, place or building that has—
 - (i) aesthetic, anthropological, archaeological, architectural, cultural, historical, scientific or social significance, or
 - (ii) other special value for present or future generations,
 - (f) the impact on the habitat of protected animals, within the meaning of the *Biodiversity Conservation Act 2016*,
 - (g) the endangering of a species of animal, plant or other form of life, whether living on land, in water or in the air,
 - (h) long-term effects on the environment,
 - (i) degradation of the quality of the environment,
 - (j) risk to the safety of the environment,
 - (k) reduction in the range of beneficial uses of the environment,
 - (l) pollution of the environment,
 - (m) environmental problems associated with the disposal of waste,
 - (n) increased demands on natural or other resources that are, or are likely to become, in short supply,
 - (o) the cumulative environmental effect with other existing or likely future activities,
 - (p) the impact on coastal processes and coastal hazards, including those under projected climate change conditions,
 - (q) applicable local strategic planning statements, regional strategic plans or district strategic plans made under the Act, Division 3.1,
 - (r) other relevant environmental factors.

²⁶ Planning Act, s 5.1(1)(g) excludes activity “for which development consent under Part 4 is required”.

While s 171 has no application, the fact that it refers to “climate change” only in par (p) and almost tangentially and only in relation to coastal processes and hazards indicates a consistent approach in relation to climate change: it is largely ignored in planning processes. What is required is clear direction, applicable to coal mine proposals, identifying risks of harm specific to climate change, as suggested in the final section of this report.

(6) Role of Environmental Protection Authority

The NSW Environment Protection Authority (“EPA”) was established by the *Protection of the Environment Administration Act 1991* (“Administration Act”). The objects and powers of the Authority are stated in ss 6 and 9 in terms which include the following:

6 Objectives of the Authority

- (1) The objectives of the Authority are—
 - (a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development, and
 - (b) to reduce the risks to human health and prevent the degradation of the environment, by means such as the following—
 - promoting pollution prevention,
 - adopting the principle of reducing to harmless levels the discharge into the air, water or land of substances likely to cause harm to the environment,
 - taking action in relation to climate change,
 - ...
 - adopting minimum environmental standards prescribed by complementary Commonwealth and State legislation and advising the Government to prescribe more stringent standards where appropriate,
 - setting mandatory targets for environmental improvement,
 -

9 Powers of Authority relating to environmental quality²⁷

- (1) The Authority is required to—
 - (a) develop environmental quality objectives, guidelines and policies to ensure environment protection, and
Example of developing objectives, guidelines and policies to ensure environment protection—
 developing environmental quality objectives, guidelines and policies to ensure environment protection from climate change

²⁷ The example after par (a) was added by the *Environment Protection Legislation Amendment (Stronger Regulation and Penalties) Act 2024* (NSW) (“2024 EPLA”), Sch 8[4]; the possibility of simply adding “including from climate change” appears to have escaped the drafter.

- (b) monitor the state of the environment for the purpose of assessing trends and the achievement of environmental quality objectives, guidelines, policies and standards.
- (2) The Authority is required to develop a comprehensive scheme of environmental audit with respect to industry, commerce and public authorities.

The third bullet point in s 6(1)(b) (taking action in relation to climate change) was introduced in April 2024.²⁸ Three years earlier the Land and Environment Court had ordered the Authority “to develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change”.²⁹ The judgment analysed and rejected seven documents relied on by the Authority as adequately addressing “the topics of greenhouse gas emissions and climate change, whether directly or indirectly”.³⁰ The Chief Judge concluded:

[143] ... In order to discharge the duty, the EPA must at least develop environmental quality objectives, guidelines and policies to ensure the protection of the environment from threats of great magnitude and impact. Climate change is an exemplar of such a threat to the environment. The development of environmental quality objectives, guidelines and policies directed towards ancillary or insignificant causes or consequences of climate change is not sufficient to discharge the duty in s 9(1)(a) of the [Administration] Act.

2023 Policies

In January 2023 the Authority published the *EPA Climate Change Policy* and a *Climate Change Action Plan 2023-26*. The document purported to comply with the Authority’s obligations under ss 6 and 9 of the Administration Act. Whether the current policy complies with the statutory duties may be doubted but need not be addressed here. It should be noted, however, that whilst “climate risk” is acknowledged in the section of the latter policy dealing with mitigation,³¹ at no point does either document acknowledge that the global climate system takes no notice of national (let alone state) borders and that burning NSW coal overseas will inevitably create harms to people and the environment in NSW (assuming that the EPA is correct in limiting its concerns to this state).

2025 Large Emitters Policy

In January 2025 the EPA released a *NSW Guide for Large Emitters*, described as “Guidance on how to prepare a greenhouse gas assessment as part of NSW environmental planning processes”. Its purpose was identified in the following terms:

²⁸ 2024 EPLA, Sch 8[2].

²⁹ *Bushfire Survivors for Climate Action Inc v Environment Protection Authority* [2021] NSWLEC 92; 250 LGERA 1 (Preston CJ).

³⁰ Ibid at [102] and [107]-[142].

³¹ Climate Change Action Plan 2023-26, p 56.

The purpose of this guide is to:

- make sure that climate change considerations are adequately addressed by proponents seeking planning approval
- set out the expectations of what should be included in information submitted through planning processes
- ensure planning approvals contain appropriate conditions
- help NSW reach its legislated emissions reduction targets.

The EPA will consider the information in a proponent's environmental impact statement when it prepares advice for the planning authority, and when determining licence applications if planning approval is granted.

Although the Guide identifies “scope 3 emissions” in conventional terms as including emissions from the end use of a sold product, it does not once refer to burning fossil fuels overseas. Rather it explicitly states:³²

The geographic scope of the EPA's obligations is the state of NSW.

It thus perpetuates the erroneous view that emissions from NSW coal burnt overseas need not be assessed. No reason is given for the assumption that GHGs from burning NSW coal overseas do not affect the environment in NSW, nor for an assumption, perhaps, that the NSW planning process does not and should not assess those effects. Whether it reads both cl 2.20 of the Mining SEPP and s 4.15 of the Planning Act as neither requiring nor permitting such an assessment remains unknown. The EPA's approach is inconsistent with that of the Net Zero Commission's (admittedly later) Spotlight Report, and the (later) ICJ's findings as to States' common but differentiated responsibilities which encompass such emissions.

The resulting confusion in State Government policies is disturbing. Nevertheless, the legal solution is clear: if the Administration Act imposes such a limited (and scientifically incoherent) remit on the EPA in relation to the planning approval process, it is inconsistent with the Net Zero Act, which states that in the event of inconsistency it prevails.

(7) Policies, programs and guidelines

The IPC is required under the Mining SEPP, cl 2.20(2), to have regard to “policies, programs or guidelines concerning greenhouse gas emissions”. There are both national and State policies and guidelines in relation to reduction of domestic emissions, supplementing the statutory schemes, but of the few that have general application in

³² Guide, p 7.

relation to climate change most are focused on adaptation, not on mitigation.³³ Those which appear most relevant are noted below, followed by a consideration of the legal limitations on applying policies.

Policies and guidelines are similar in purpose and effect and can be addressed together: programs are likely to be directed, not to the decision-making process, but to financial support for the energy transition, for example. The Commonwealth “emissions reduction safeguard mechanism”,³⁴ based in statute and not merely a policy, may be a relevant national program, but is directed to reducing domestic emissions and will only affect mining to the extent that a miner releases more than 100,000 tonnes of CO² emissions (including scope 3 emissions) in Australia.³⁵

Review of Assessment Reports

In August 2017, the NSW Department of Planning released the Final Report of an independent review of “Assessment Reports”. The Report recommended improvements to the reports prepared in the planning process, but made no comment on the “Guidelines” produced by the Department to assist proponents of proposed developments. It is not possible to analyse all the guidelines here, but an important example should be addressed.

Guidelines for the Economic Assessment of Mining

The “Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals” commence with the following explanation:

The purpose of these Guidelines is to assist proponents with providing the necessary information to meet some of the requirements of section 79C of the *Environmental Planning and Assessment Act 1979* In particular these Guidelines focus on the following two matters the consent authority must take into consideration in determining a development application:

- The public interest; and
- The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

Consistent with the approach to evaluations in other areas of State Government decision making, the public interest in these guidelines is focused on the collective public interest of households in NSW.

³³ See, e.g., Climate Risk Ready NSW Guide (2021) (Department of Planning and Environment, with Treasury), NSW Climate Change Adaptation Strategy (2022), NSW Climate Change Adaptation Action Plan 2025-2029.

³⁴ *National Greenhouse and Energy Reporting Act 2007* (Cth), Pt 3H.

³⁵ *Ibid*, s 22XJ(1)(b) and National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015 (Cth), s 8.

Because the Guidelines bear the date December 2015, they do not refer to the current section of the Planning Act and have not been updated to do so. Substantively, the Guidelines reflect an interpretation of s 4.15(1)(b) of the Planning Act relied on by the IPC in *Denman*, treating the reference to “economic impacts in the locality” as words of confinement; they do not reflect the guidance provided by the Net Zero Commission’s Spotlight Report; they do not contain a single reference to “climate change”; yet they are on the Department’s website in February 2026.³⁶ They are presumably used, not only by proponents, but by the Secretary in preparing reports for the IPC and by the IPC in assessing applications.

Technical Note 9

The Guidelines are supported by Technical Notes. Technical Note 9 addresses greenhouse gas emissions,³⁷ and “sets out the preferred approach for estimating and costing GHG emissions”. It is dated April 2018. The document acknowledges that “[s]cope 3 emissions reference the GHG output of other suppliers of goods and services to the business operation, and emissions of those who purchase (and own) the product including those occurring overseas”. However, it continues:³⁸

For the purposes of this analysis, only Scope 1 and Scope 2 emissions need to be reported, along with energy use and activity estimates used to derive these estimates.

The Note adds some gratuitous, and arguably mischievous, advice to proponents:³⁹

Proponents may also provide estimates of Scope 3 emission impacts. This additional information would be helpful in reducing residual uncertainty around total project emission impacts, and viewed favourably as **evidence of the proponent’s strategic consideration of future GHG** emission levels and potential cost exposures. However, it is noted that the Scope 3 accounting framework is inconsistent with established national accounting rules established under the UN Framework Convention on Climate Change , and could potentially result in **‘double counting’ of emissions when applied in conjunction with Scope 1 and Scope 2 because emissions ‘ownership’ would be attributed to both the producer and end-user** of a product, service or fuel. [Emphasis in original.]

This statement is inconsistent with the obligation in cl 20.2(2) of the Mining SEPP to have regard to downstream emissions. Even disregarding the recent statement by the International Court of Justice of Australia’s international law obligations (discussed below), the Technical Note misreads the Paris Agreement. As explained in the report,

³⁶ Stated as last updated: 30/10/2025.

³⁷ Technical Note 9, pp 44-48.

³⁸ Ibid, p 45.

³⁹ Ibid.

State of Denial,⁴⁰ the Paris Agreement is not a set of “accounting rules”, nor does it deal with “ownership” of emissions. Article 13 of the Paris Agreement establishes an enhanced transparency framework that builds on the transparency arrangements under the UN Framework Convention on Climate Change. Each State is required to provide and maintain a national inventory of its anthropogenic greenhouse gas emissions, using the agreed methodologies approved by the IPCC, and information necessary to track progress made in implementing and achieving its nationally determined contribution (NDC). Far from discouraging States from taking action to reduce their fossil fuel production for export, the Paris Agreement encourages each Party to take actions which reflect “its highest possible ambition”⁴¹ and “to undertake ... ambitious efforts ... with the view to achieving”⁴² the temperature goal of holding the increase in global average temperature to well below 2°C and pursuing efforts to limit the increase to 1.5°C.⁴³ While these efforts “shall” include “domestic mitigation measures”,⁴⁴ they are not limited to those by the Agreement, nor does that phrase exclude domestic control of the extraction and export of fossil fuels. The Paris Agreement adds that the temperature goal is to be achieved through Parties aiming for “global peaking of greenhouse gas emissions as soon as possible”, with “rapid reductions thereafter”⁴⁵ and in a manner which “reflect[s] equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”.⁴⁶ Technical Note 9 adopted by the Department is a subversion of these principles. If relied on by the IPC it puts Australia at risk of internationally unlawful action.

The language of Technical Note 9 has significance at another level: it explains references in IPC determinations to the fact that 90% (or more) of scope 3 emissions arise from the burning of coal, without any indication that this is a weighty factor against permitting a new or expanded coal mine. In *Denman* the key passage in the IPC’s reasons stated:

150 The Commission acknowledges that the mining of coal and its combustion is a major contributor to anthropogenic climate change, which has the potential to impact future generations. The Commission acknowledges that although the Project’s Scope 3 emissions would contribute to anthropogenic climate change, these are appropriately regulated and

⁴⁰ G Moon and N Kennedy, *State of Denial – Australia’s legal obligations for human rights harms within Australia from its fossil fuel exports* (Australian Climate Accountability Project, September 2025) < https://www.humanrights.unsw.edu.au/sites/default/files/documents/State%20of%20Denial%20-%20Final_0.pdf>.

⁴¹ Paris Agreement, Article 4.3.

⁴² Ibid, Article 3.

⁴³ Ibid, Article 2.1.

⁴⁴ Ibid, Article 4.2.

⁴⁵ Ibid, Article 4.1.

⁴⁶ Ibid, Article 2.2.

accounted for through broader national policies and international agreements (such as the Paris Agreement).

151 The Commission notes that the GHG emissions associated with burning coal to produce energy are accounted for at the international powerplants where that combustion takes place. The Commission agrees with the Department and acknowledges that under the Paris Agreement accounting rules and Australian legislation, Scope 3 emissions are not included in Project emission reporting, to avoid double counting. However, the Commission has considered all emissions associated with the Project (including Scope 3 emissions) in its assessment and determination.

This passage commits the errors identified above in Technical Note 9, thereby misunderstanding the scope and purposes of the Paris Agreement.

Strategic Statement on Coal Exploration and Mining

In August 2020 the then Deputy Premier and Minister for Regional NSW, Industry and Trade released a document entitled “Strategic Statement on Coal Exploration and Mining in NSW”. The status of the document will be considered below. Its thrust was that, whilst there would be a decline in demand for export coal over the coming decades, the Government was committed to maintaining supply, while taking appropriate steps to support communities that would be adversely affected by the transition from fossil fuels in the longer term. The document stated that:

Ending or reducing NSW thermal coal exports while there is still strong long-term global demand would likely have little or no impact on global carbon emissions. Most coal consumers would be likely to source their new coal from elsewhere, and much of this coal would be lower quality compared to NSW coal. Reducing demand for thermal coal in line with the Paris Agreement by progressively replacing coal-fired electricity with cleaner energy sources, as has been seen in Europe, will be more effective in reducing global emissions than reducing NSW coal supplies.

The Statement also acknowledged:

Many countries around the world have begun a transition away from fossil fuels to low carbon sources of energy to meet commitments under the Paris Agreement. This will ultimately lead to the global phasing out of coal in electricity generation (thermal coal), but will take some decades to complete.

The first statement is untenable on a number of fronts. First, the “alternative source” or “market substitution” argument is factually unproven and speculative (new coal mines

take years to be approved and developed) and has been rejected as irrelevant by courts both in this State and overseas.⁴⁷

Secondly, the question of ending or reducing NSW thermal coal exports is separate from the question of expanding those exports by opening new coal mines. (The Statement made no claim of increased future demand: indeed, the second passage quoted above indicates why.) Thirdly, the express abnegation of responsibility for supply of fossil fuels is inconsistent with Australia's obligations under the Paris Agreement and the principles established by the ICJ Advisory Opinion (discussed below) and would potentially lead Australia into unlawful activity which may lead to claims for compensation. Given the expected decrease in demand, and the Government's commitment to support the industry to transition, existing coal miners with approvals extending for decades might well be concerned at any support for large new mines. But the Government might be concerned at the likely increased costs of transitioning an expanding work force involved in new projects. Neither of these issues appears to have been addressed.

Legal principles

The application of government policy is limited to legally permissible material. A brief consideration of basic constitutional principles is necessary. In referring to the role of international treaties in Australian domestic law, it will be noted below that treaties are ineffective unless enacted by statute. The fundamental reason is that the executive arm of government does not have power to legislate or to change domestic law. According to the same principle, the executive cannot change the law by promulgating a policy which is inconsistent with statute.

That principle is not engaged if the parliament enacts a statute which delegates to the executive power to make regulations not inconsistent with the statute: the result is described as "delegated legislation". Indeed, it is possible by express provision for the parliament to permit the executive to vary the statute itself: such provisions are known as "Henry VIII clauses" and are both controversial and rare and must identify their intended effect in clear language.⁴⁸

What then is the legal effect of delegated legislation, such as the Mining SEPP, providing that a government authority may determine a matter by "having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions"? Could a government policy or guideline lawfully direct that the IPC, in considering an application to mine coal intended for export, disregard the greenhouse

⁴⁷ It was comprehensively addressed by Preston CJ of LEC in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; (2019) 234 LGERA 257 at [534]-[545], and especially in [545]; see more recently, *Norway v Greenpeace Nordic and Nature and Youth Norway*, (European Free Trade Association Court, Case E 18/24; 21 May 2025) at [94]-[95].

⁴⁸ *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1; [2014] HCA 18 at [34].

gas emissions which might be produced overseas? Such a policy would be inconsistent with the very provision which purportedly required it to be taken into account. The resolution of that dilemma is that the clause in the Mining SEPP should be read as a whole and a policy which purported to require disregard of another part of that clause would not be picked up by the obligation to have regard to policies. (This was the approach adopted in *Hickman's Case*⁴⁹ to read down clauses in a statute purporting to oust the jurisdiction of a court to enforce compliance with the limited power otherwise conferred by the statute.)

The principle which precludes the executive from varying statute law also applies to domestic law generally. That means that if, as suggested below, Australia's domestic law incorporates the principles established by the ICJ Advisory Opinion, the State executive cannot avoid those responsibilities by directing its authorities as a matter of policy to ignore those principles. A policy which purported to have that effect would be invalid. It is, of course, trite to say that the NSW parliament can change domestic law, so long as it does not impair or derogate from relevant Commonwealth laws. Would such a policy be valid because it obtains legal authority from the Mining SEPP itself, which implicitly authorises such policies and guidelines? The answer is no, because the SEPP does not expressly do so, and for delegated legislation to authorise the executive to change the law would require clear words in the statute authorizing the SEPP: there are none. It would be expected that a power to amend a statute would be done by regulation which would necessarily be tabled in parliament and be subject to disallowance. The conferral on an administrative decision-maker of a power to have regard to policies is to be read in context as just that, and not as a power to amend the law.

Finally, if the principles established by the ICJ Advisory Opinion do *not* form part of domestic law, statutes will nevertheless be construed, so far as possible, to be consistent with Australia's international law obligations. The result is the same.

Two other points should be made with respect to policies and guidelines prepared by the Department of Planning. First, it is far from clear that there are any present policies or guidelines which fall within the description in cl 2.20 of the Mining SEPP. Secondly, if the IPC relies for its decisions on particular government policies, it should identify them in its reasons. It is necessary to review departmental submissions to the IPC to see whether any policies are relied upon before the IPC, on which, directly or indirectly, weight may have been placed, though not expressly identified in the IPC's determination.

⁴⁹ *The King v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598; [1945] HCA 53.

C INTERNATIONAL LAW PRINCIPLES

(1) *General propositions*

ICJ Advisory Opinion

In July 2025 the International Court of Justice (ICJ) issued an Advisory Opinion answering questions referred by the United Nations General Assembly as to certain international law principles in relation to climate change. The unanimous conclusions of the 15-member Court were that (i) each State owes a customary international law duty to use all means at its disposal to prevent significant harm to the climate system,⁵⁰ and (ii) the right to a clean, healthy and sustainable environment is inherent in the enjoyment of other human rights and, arguably, also a norm of international law.⁵¹ The ICJ further stated:

290 The Court considers that the obligation of a State “to use all the means at its disposal” to prevent significant harm to the environment ... implies that the capabilities of a State are a key factor, as reflected in the principle of common but differentiated responsibilities and respective capabilities, for the determination of the applicable standard of due diligence in a particular situation. In the view of the Court, when determining the appropriate measures to be adopted by a State, the principle of common but differentiated responsibilities and respective capabilities must be taken into account.”

The ICJ concluded that the 2015 Paris Agreement and subsequent State action, taken together, require that States take active measures to limit warming to 1.5°C above pre-industrial levels.⁵²

Those findings by the pre-eminent body responsible for determining the content of international law may be accepted for present purposes as a statement of the relevant international law principles although, as noted in a number of separate supplementary opinions, there remains a degree of imprecision and a lack of particularity in some respects. The authority of the statements is confirmed by the coincidence of the reasoning and obligations identified by the International Tribunal on the Law of the Sea (ITLOS) in its own Advisory Opinion on Climate Change, delivered on 21 May 2024.⁵³ Before considering the stated obligations further, it is convenient to identify the relevance of the international law principles in addressing obligations under Australian domestic law.

Relevance to domestic law

The first conventional proposition is that by entering into a treaty, the Executive government cannot change domestic law: a statute is necessary to give effect to the terms

⁵⁰ ICJ 2025 Advisory Opinion, [132] and [281].

⁵¹ ICJ 2025 Advisory Opinion, [393].

⁵² ICJ 2025 Advisory Opinion, [224] and [270].

⁵³ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion Submitted to the Tribunal)*, Advisory Opinion, ITLOS Case No. 31, 21 May 2024.

of the treaty. That does not mean the terms of the treaty are irrelevant: they may, for example, assist in the construction of domestic statutes; they may also be reflected in government policy which may be given effect by the administration of existing laws – a point to which it will be necessary to return. A second area, which is less well settled, is the effect of customary international law doctrine in Australia. Is it subject to express statutory incorporation? Or can it operate as domestic law, absent inconsistent statutory provisions?

Much of the current legal understanding derives from a dictum of Dixon J in *Chow Hung Ching v The King*,⁵⁴ to the effect that customary international law “is not a part, but is one of the sources, of English law”. Because the precise content of the general law will only be resolved by a judicial ruling, the extent of this qualified principle is by no means clear. Further, that reasoning was based entirely on two academic commentaries: it ignored the history of English judicial precedent and failed to address the powerful critique of the two academic commentaries by a distinguished international law scholar, Sir Hersch Lauterpacht QC. The better view, developed in a forthcoming publication,⁵⁵ is that the incorporation of customary international law into domestic law is not an intrusion on Australia’s sovereignty by a foreign entity, but rather the application of an established doctrine of the common law based on the principle that we live under, and should abide by, an international system of the rule of law. Nowhere does this obligation loom larger than in relation to conduct in Australia which contributes by an indivisible process to a changing climate system with potentially devastating consequences, both globally and in Australia. That will not prevent the Parliament overriding an otherwise applicable international law obligation, but principles of statutory interpretation will require clear words for that effect. Both federal and state legislation presently indicate an intention to comply with rather than confront that value.

Thus, it is necessary to determine what precisely is the content of Australia’s obligations, consistent with the ICJ Advisory Opinion.⁵⁶ The present focus is on fossil fuels for export, which comprise some 87% of NSW production⁵⁷ and will likely comprise the total of production from new or extended mining operations.

(2) *Australia’s obligations – export of fossil fuels*

The international legal obligations may be characterised at varying levels of particularity. Thus, a finding that States have an obligation to prevent significant harm to earth’s climate system operates at the highest level of generality, as does a finding that States must

⁵⁴ (1948) 77 CLR 449, 477 (Dixon J).

⁵⁵ Basten J, “Australia’s Climate Change Legal Obligations” (2026) 100 ALJ (forthcoming) and SSRN.

⁵⁶ Basten J, “Climate Change: Government Responsibilities under Australian Law” (2026) 100 ALJ (forthcoming) and SSRN.

⁵⁷ Net Zero Commission Spotlight Report, p 4.

exercise “due diligence” in relation to activities within their jurisdictions and control which are capable of harming the climate system. A finding that States must carry out environmental assessments in relation to such actions is still generic, but it identifies an activity which is well-understood in environmental law.

At an intermediate level of particularity, the obligation would identify the particular harms which must be investigated and assessed. That is, are they local national or global, and do they include extreme weather events, employment, and financial consequences? At the most particular and practically important level, guidance is required directed to decision-makers whose function it is to approve or reject specific proposals. How exactly are conflicting benefits and harms to be weighed and resolved?

General obligations

The first proposition is that under customary international law Australia is obliged “to ensure the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas emissions”. The ICJ concluded that this obligation included “a duty to prevent significant harm to the environment by acting with due diligence and to use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system and other parts of the environment, in accordance with their common but differentiated responsibilities and respective capabilities”.⁵⁸ This proposition may be broken down into several parts. There is an underlying assumption that “anthropogenic greenhouse gas emissions” cause climate change. The scientific evidence for that connection need not be repeated here: it has been demonstrated by the UN Intergovernmental Panel on Climate Change (IPCC) that there is a near-linear relation between CO₂ emissions and global mean temperature increases.⁵⁹ That involves a change to the earth’s “climate system”.

A further assumption is that temperature increases cause harm to the environment: again, that is established by scientific observations. Self-evidently, changes will vary across the globe, but the ICJ noted the following impacts of rising temperatures as constituting “significant harm to the environment”, against which all States have a duty to protect:

- 73 The consequences of climate change are severe and far-reaching; they affect both natural ecosystems and human populations. Rising temperatures are causing the melting of ice sheets and glaciers, leading to sea level rise and threatening coastal communities with unprecedented flooding. Extreme weather events, such as hurricanes, droughts and heatwaves, are becoming more frequent and intense, devastating agriculture, displacing populations and exacerbating water shortages. Furthermore, the disruption of natural habitats is pushing certain species toward

⁵⁸ ICJ Advisory Opinion, *Obligations of States in respect of Climate Change* (2025) (“ICJ 2025 Advisory Opinion”) at [457B].

⁵⁹ See fn 69 below.

extinction and leading to irreversible loss of biodiversity. Human life and health are also at risk, with an increased incidence of heat-related illnesses and the spread of climate-related diseases. These consequences underscore the urgent and existential threat posed by climate change.

Other general obligations are more pertinent at the national level, an example being “the customary duty to co-operate for the protection of the environment”.⁶⁰ The ICJ observed that, in the climate change context, co-operation “is not a matter of choice for States but a pressing need and a legal obligation.”⁶¹ An illustration of performance of the duty to cooperate is the obligation of each country under the Paris Agreement to prepare, register and maintain a “nationally determined contribution” to the global reduction of anthropogenic CO₂, that obligation resting primarily on the Commonwealth, although the necessary action to achieve the determined objectives will rest with the states and territories.

Intermediate obligations

All general obligations may be broken down into component parts: that is, States must exercise regulatory control in relation to the approval, imposition of conditions upon, or rejection of, individual projects and proposals. These derived obligations may be described as intermediate obligations. The ICJ’s statement of the above general obligation also sets out two ways in which States can meet the duty: by “acting with due diligence” and by “using all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system and other parts of the environment”, each undertaken “in accordance with their common but differentiated responsibilities and respective capabilities”.

The standard of due diligence required in relation to the risks presented by climate change is “stringent”. The elements of due diligence in this context “include States taking, to the best of their ability, appropriate and, if necessary, precautionary, measures which take account of scientific and technological information, as well as relevant rules and international standards, and which vary depending on each State’s capabilities. Other elements include undertaking risk assessments and notifying and consulting other States as appropriate.”⁶² The obligation also “entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control” involving “a heightened degree of vigilance and prevention”.⁶³

They were recognized by the ICJ in the following passage:

⁶⁰ ICJ 2025 Advisory Opinion, [215].

⁶¹ ICJ 2025 Advisory Opinion, [308].

⁶² ICJ 2025 Advisory Opinion, [136].

⁶³ ICJ 2025 Advisory Opinion, [138].

282 As far as climate change is concerned, such appropriate rules and measures include, but are not limited to, regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system. Adaptation measures reduce the risk of significant harm occurring and are therefore also relevant for assessing whether a State is fulfilling its customary obligations with due diligence. These rules and measures must regulate the conduct of public and private operators within the States' jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.

The ICJ continued:

427 In considering the alleged difficulties in attributing actions or omissions to a State, the Court emphasizes at the outset that attribution is to be based on criteria determined by international law. In the Court's view, the "well-established rule of international law" that "the conduct of any organ of a State must be regarded as an act of that State" ... Failure of a State to take appropriate action to protect the climate system from GHG emissions — including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies — may constitute an internationally wrongful act which is attributable to that State. The Court also emphasizes that the internationally wrongful act in question is not the emission of GHGs per se, but the breach of conventional and customary obligations identified under question (a) pertaining to the protection of the climate system from significant harm resulting from anthropogenic emissions of such gases.

Particular obligations

At a third level, involving greater particularity, this last statement requires that specific regulatory action apply the broadly stated principles. The relevant institutional structure in Australia is found in the development approval processes which operate primarily at the state and territory level. The primary instrument for appraisal is the requirement that a proponent prepare and publish an environmental impact statement. The ICJ stated:

297 The Court therefore considers that the requirement to undertake an environmental impact assessment (hereinafter "EIA") in cases of proposed industrial activities in a transboundary context is an expression of a more general rule requiring the assessment of risks to the environment. Since customary international law does not "specify the scope and content of an environmental assessment" ... and given the multifaceted and contextual character of the due diligence standard, any EIA for the purpose of preventing significant harm to the climate system needs to take the specific character of the respective risk into account.

298 ... The Court is of the view that the risks posed by climate change have certain features that may affect the appropriateness of certain forms of environmental risk assessment. It may therefore be reasonable for States to conduct their

assessments of the risk caused by GHG emissions by way of general procedures covering different forms of activities. Such general procedures do not exclude that possible specific climate-related effects must be assessed as part of EIAs at the level of proposed individual activities, e.g. for the purpose of assessing their possible downstream effects.

These mechanisms are in place in NSW: the critical questions are (a) what matters are required to be considered, and (b) how should the assessment process work? The policies and guidance in contemporary documents do not meet these standards.

By way of comparison, the relevant European Union Directive, adopted in April 2014, is shorter on detail but expressly and clearly addresses greenhouse gas emissions. Art 3(1) reads:⁶⁴

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:

- (a) population and human health;
- (b) biodiversity, with particular attention to species and habitats protected under [specified Directives];
- (c) land, soil, water, air and climate;
- (d) material assets, cultural heritage and the landscape;
- (e) the interaction between the factors referred to in points (a) to (d).

The Directive requires that an EIA include:⁶⁵

- 4 A description of the factors specified in Article 3(1) likely to be significantly affected by the project: population, human health, biodiversity (for example fauna and flora), ... air, climate (for example greenhouse gas emissions, impacts relevant to adaptation), material assets, cultural heritage, including architectural and archaeological aspects, and landscape.
- 5 A description of the likely significant effects of the project on the environment resulting from, inter alia:
 - ...
 - (e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;
 - (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;
 - ...

⁶⁴ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, Official Journal of the European Union (25.4.2014) L 124/1, 8.

⁶⁵ Directive, Art 5(1)(f) and Annex IV.

The description of the likely significant effects on the factors specified in Article 3(1) should cover the *direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project*. [Emphasis added.]

In 2023 two environment groups challenged the validity of decisions by the Norwegian Ministry of Energy granting consent to the development and operation of three petroleum and natural gas extraction projects in the North Sea. The EIAs did not address the impact on the climate of greenhouse gas emissions arising from combustion of the petroleum and natural gas to be extracted by the project and sold to third parties. The legal issue was whether the EIAs complied with Art 3(1) of the EU Directive. The Norwegian Government contended that that step was not necessary as the effects of such combustion did not constitute “the direct and indirect significant effects of a project”, within Art 3(1). That issue was referred by the Norwegian Court (the Borgarting Court of Appeal) to the European Free Trade Association (EFTA) Court for an Advisory Opinion answering specific questions. On 21 May 2025, the EFTA Court ruled that “greenhouse gas emissions that will be released from the combustion of petroleum and natural gas extracted as part of [such a] project and then sold to third parties, constitute ‘effects’ of that project within the meaning of the Directive”.⁶⁶ The Court’s reasoning concluded:

65 It follows that Article 3(1)(c) of the EIA Directive requires that the environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, all the direct and indirect likely significant effects of each project on several factors, including the climate. These effects must be fully examined and in a comprehensive manner

The effects of the greenhouse gas emissions from the combustion of petroleum and natural gas extracted and sold to third parties

...

67 The Court recalls that combating climate change is an objective of fundamental importance given its adverse effects and the severity of its consequences, including the grave risk of their irreversibility and its impact on fundamental rights Greenhouse gas emissions are one of the main causes of climate change which the EEA States have made a commitment to combat

...

⁶⁶ *Föreningen Greenpeace Norden and Natur og Ungdom v. State of Norway* (EFTA Court Advisory Opinion, 21 May 2025) at [99]; https://cdn.climatepolicyradar.org/navigator/XAA/2024/foreningen-greenpeace-norden-and-natur-og-ungdom-v-state-of-norway-efta-court-advisory-opinion_924ac5fd9fffc4d53ec3b1a205cc58f9.pdf

- 69 As noted by the respondents in the main proceedings, the release of greenhouse gas emissions is very likely to follow the antecedent action of extracting petroleum and natural gas in a project such as that at issue. If not for the project, the embedded greenhouse gases would stay below ground. As such, the extraction of the petroleum and natural gas represents a necessary precondition of burning it as fuel, thereby releasing emissions with an impact on the climate. It follows that the combustion of the petroleum and natural gas extracted and subsequently sold to third parties are likely effects of the project.

Both the conclusion and the reasoning of the EFTA Court conform to rulings in the ITLOS, the ICJ, the UK Supreme Court,⁶⁷ and the Queensland Land Court⁶⁸. The term preferred in much NSW legislation is “impacts” rather than “effects”, but a purposive construction leads to the same result.

D QUANTIFIABLE HARMS

(1) *Developments in attribution science*

A common assertion by proponents of fossil fuel extraction proposals is that the additional GHGs released over the life of the project will not have “significant” effects on the environment. There are two limbs to the assertion: the first is that the identifiable harms resulting from climate change are a global problem which has been underway for over 100 years and to which the project will make an infinitesimal contribution. The second is that even a small contribution cannot be shown to be responsible for harms in NSW.

If the correct conclusion from the scientific evidence is that NSW should be reducing (rather than increasing) its coal extraction, these assertions are immaterial: no new or extensions of existing projects should gain approval. If that conclusion is not accepted, the assertions need to be addressed.

First, by way of response, the tonnage of CO² to be released from the coal proposed to be extracted annually over the life of the project is calculable and commonly agreed. Secondly, every additional tonne of CO² emissions adds to global warming and the IPCC states that every fraction of a degree of global warming matters. Further, there is a “near-linear relationship between cumulative CO² emissions and human-caused global warming demonstrated for historical data (1850–2019)”.⁶⁹ This is known as the “transient

⁶⁷ *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] WLR(D) 275; [2024] UKSC 20, also dealing with the scope of the term “effects” at [4].

⁶⁸ *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)* [2022] QLC 21.

⁶⁹ Abram NJ, Maher N, Perkins-Kirkpatrick S et al “Quantifying the regional to global climate impacts of individual fossil fuel projects to inform decision-making” *npj Clim Action* 4, 92 (2025) (“Abram et al”), p 2

climate response to CO² emissions (TCRE)".⁷⁰ Thirdly, it is possible to calculate, with defined degrees of certainty, some of the consequential harms likely to correspond with the emissions released by a specific project, if approved. The techniques deployed are referred to as a branch of climate-science known as "attribution science".

The first detailed account seeking to identify specific harms with particular sets of emissions was that by Abram, et al, published in *Nature: Climate Action* in October 2025 and referred to by the Net Zero Commission in its Spotlight Report. Abram et al demonstrated the likely effects of the Scarborough natural gas project with respect to (i) the number of people who will be left outside the "human climate niche";⁷¹ (ii) an observable and rapidly escalating rise in heat-related excess deaths, and (iii) the severe impact of human-caused global warming on coral reefs evident in the newly emerging phenomenon of mass coral bleaching and mortality events. It is likely that further parameters will be forthcoming to quantify other harms emanating from particular projects.

Attribution science deals with risks of harm from particular GHG emissions: it is therefore directly consonant with s 4.15 of the Planning Act which requires consideration of "likely impacts" of a development, that is impacts which have a real chance of occurring.

(2) *Net Zero Commission Spotlight Report*

In December 2025, the Net Zero Commission produced a "Spotlight Report" which addressed the climate implications of NSW coal extraction.⁷² In relation to scope 3 emissions, the Commission stated:⁷³

Like scope 1 and 2 emissions, scope 3 emissions and their impacts may be considered under section 4.15 of the [Planning] Act and clause 2.20 of the State Environmental Planning Policy (Planning Systems) 2021 (NSW). In the historical absence of strong legal requirements and policy guidance, consent authorities have generally not meaningfully addressed scope 3 emissions.

The second sentence is partly correct, although the qualifier "generally" invites the question – When has this in fact been done? The first sentence suggests that the

(col 2); referring to, V. Masson-Delmotte et al (eds), IPCC, *Climate Change 2021: The Physical Science Basis: Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, "Summary for Policymakers", 3-32 at p 28, accessed 26 February 2026 at - https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SummaryVolume.pdf.

⁷⁰ Ibid.

⁷¹ Put briefly, the term "describes the climate conditions in which human societies have historically thrived and is defined by the distribution of the human population with respect to mean annual temperature": Abram et al, p 3.

⁷² Net Zero Commission NSW, *Coal Mining Emissions Spotlight Report* (2025) ("Spotlight Report").

⁷³ Ibid, pp 39-40.

exercise is discretionary (“may be considered”): as has been explained, there is a statutory obligation to carry out such an assessment.

The assessments should involve three steps: the first is to identify the likely quantity of CO₂e to result from burning the coal extracted from the proposed mine or mine-expansion; this is generally a product of the volume and quality of the coal. The second involves the calculation of the consequent increase in the atmospheric temperature; as previously mentioned, the IPCC has stated that there is a near-linear relationship between a given quantity of carbon emissions and the resultant global mean temperature rise, a consensus finding of reputable scientists with relevant expertise.⁷⁴ The third step involves the identification of consequent changes to the habitable environment. The capability to make reasonable predictions in relation to consequential harm, referred to above as attribution science, is a developing field. As the Net Zero Commission explains, relatively specific predictions can now be made in relation to relatively small rises in temperature.⁷⁵ Significant work is also being undertaken to identify areas and activities which will be impacted by climate change resulting from fractional increases in global mean temperatures.

(3) *National Climate Risk Assessment*

In September 2025, the Australian Climate Service⁷⁶ (ACS) produced its first report entitled *Australia’s National Climate Risk Assessment*.⁷⁷ The report was not directed to the obligation to mitigate but provides a helpful summary of the harms which a consent authority should address in considering any proposal for further fossil fuel extraction. The Executive Summary stated (p iv):

The Australian Climate Service has rated risks to Australia’s key systems, both now and in the future. The risk ratings categorise impacts into 5 levels – Low, Moderate, High, Very High and Severe – based on specific criteria. These ratings consider the percentage of the population affected, the extent of geographical impact, and the severity of consequences for vulnerable communities, public health, natural systems and national security. These ratings aim to inform decision-makers on the severity of expected impacts. It should be noted that future ratings assume no change in adaptation investment or approach.

⁷⁴ See text to fn 69 above.

⁷⁵ Spotlight Report, pp 39, 41 (referring to Abram et al).

⁷⁶ A partnership between the Bureau of Meteorology, CSIRO, the Australian Bureau of Statistics and Geoscience Australia.

⁷⁷ Australian Climate Service, at <https://www.acs.gov.au/pages/national-climate-risk-assessment>.

The Introduction explained that “risks and potential impacts have been assessed for [three] possible future scenarios: +1.5°C +2.0°C and +3.0°C; and for 3 timeframes: current, 2050 and 2090.”⁷⁸ The key systems analysed were:

- Communities - urban, regional and remote
- Defence and national security
- Economy, trade and finance
- Health and social support
- Infrastructure and the built environment
- Natural environment
- Primary industries, and food.

The priority hazards identified in the report were:

- Changes in temperature, including extremes
- Drought and changes in aridity
- Bushfires, grassfires and air pollution
- Extratropical storms
- Convective storms, including hail
- Tropical cyclones
- Riverine and flash flooding
- Coastal and estuarine flooding
- Coastal erosion and shoreline change
- Ocean warming and acidification.

The National Assessment noted that Australia was warming faster than the global average temperature increase:

The IPCC in their Sixth Assessment Report defines current global warming as the time of crossing a given warming level based on the 20-year average. This allows for natural variation from year to year. Current global warming is +1.2°C, meaning global average temperatures are +1.2°C warmer than the 1850–1900 pre-industrial average. Because land surfaces warm much faster than oceans, Australia, as a land mass, will reach a given warming level much faster than the globe. Australia’s average climate has warmed by +1.5°C since national records began in 1910.

(4) *Health and Wellbeing*

Under the heading “*Health and Wellbeing*”,⁷⁹ the National Assessment observed:

Australia is already experiencing adverse impacts on human health and the health and social support system from climate change, especially from hazards such as heatwaves,

⁷⁸ ACS National Risk Assessment, p 2.

⁷⁹ ACS National Risk Assessment, p 131.

floods, bushfires and tropical cyclones. These hazards are generally becoming more frequent and more intense, and can damage physical and mental health on both short and long timescales (*high confidence*).

The accompanying *Health and Wellbeing Technical Report* (2025) commenced:⁸⁰

The impacts of climate on health are significant and multifaceted, with climate change already affecting health and wellbeing through: extreme heat, dangerous storms and flooding, and landscape fire and air pollution. These hazards have direct effects on health such as mental or emotional distress, injury, disease, which can result in death. Indirect effects also adversely impact the everyday quality of life through disruptions to: critical services, infrastructure, work, and recreation. Adverse health outcomes for individuals can be related to weather patterns and microclimate, person-level factors (e.g., demographics and health status), the built and social environments, and access to health services. Climate impacts on health are unevenly distributed spatially and across society with many marginalised groups being disproportionately affected.

Heatwaves are expected to increase in number, in duration and with higher peak temperatures. Calculations undertaken in Europe for increased heat-related deaths, relied on by Abrams et al, can now be undertaken for Australia, for regions in Australia and for particular cities. The basis for such further calculations (no doubt with varying levels of precision depending on the limitations of the databases) may be found in the *Health and Wellbeing Technical Report*,⁸¹ the Executive Summary to which stated:

Current Risk

The report provides a detailed analysis of current health risks associated with heatwaves, tropical cyclones, riverine flooding, and bushfires. It includes spatial analysis of overall risk and components, local area profiles, and comparisons of different locations at risk. Heatwaves are identified as the leading cause of weather-related deaths and hospital admissions in Australia, with vulnerable populations at higher risk. Bushfires have significant health impacts, including burns, smoke inhalation, respiratory issues, and mental health problems. Tropical cyclones cause physical injuries, water-borne and vector-borne diseases, and mental health issues. Floods have severe and immediate effects on health, including drowning, physical trauma, and waterborne diseases. The analysis of current risk involves the use of national-level datasets to develop hazard-specific health risk indicators and indices. Spatial analysis techniques are applied to map and analyse the distribution of risks across different areas. Local area profiles and comparisons are created to identify disparities and target interventions where they are most needed.

⁸⁰ Australian Climate Service, *Health and Wellbeing Technical Report: A technical report for the National Climate Risk Assessment* (2025), Introduction, p 3 (references omitted).

⁸¹ Ibid., pp 1-2.

Future Risk

The report projects future health outcomes based on climate change scenarios, highlighting the importance of understanding complex risk interactions. It emphasises that climate change will increase the intensity and frequency of climate-related hazards, exacerbating health risks. For example, heatwaves are expected to become more frequent and severe, leading to higher mortality and morbidity rates. Bushfires are projected to increase in frequency and intensity, posing greater health risks. Tropical cyclones are expected to become more intense, causing more severe health impacts. Flooding is projected to become more severe, increasing the risk of waterborne diseases and other health issues. Future risk projections are based on climate change scenarios using Global Warming Levels (GWLs) of +1.5°C, +2.0°C, and +3.0°C.

The Report noted that an historical study revealed:⁸²

All major cities experienced significant increases in mortality risk during heatwaves. The greatest increases in heatwave related mortality risk and excess deaths were observed in Adelaide (8%; 328 deaths), Hobart (6%; 48 deaths), Melbourne (3%; 355 deaths), Sydney (3%; 341 deaths) and Perth (2%; 94 deaths) from 2007 to 2017.

When increased mortality from bushfires (including smoke inhalation), floods and a combination of extreme events is accounted for it is likely that the effects in Australia will be greater than the effects calculated by Abrams et al:

In Europe, where suitable health data is available across 854 cities, recent work has quantified that under a low mitigation and low adaptation scenario (SSP3-7.0), the death burden of climate change will increase by 49% this century. Using the middle-of-the-road emissions and demographic scenario (SSP2-4.5) for projected European deaths (Fig. 2b, Supplementary Fig. 2a), it can be estimated that in Europe alone the additional climate warming caused by the Scarborough project will result in an additional 484 heat-related deaths by the end of this century (with a likely range of 88 to 1324 additional heat related deaths; Methods). Heat-related excess deaths in Europe are projected to be most common in southern regions, and when taking into account reduced cold-related deaths primarily in northern Europe, the net effect of additional warming caused by Scarborough project emissions is estimated to cost 118 lost lives (–161 to 851 likely range) in Europe alone.

Human health is only one aspect of the public interest, though no doubt one of high importance. Economic factors also form a key aspect of many assessments, because proponents rely on employment, stimulus to the local or regional economy, and royalty payments as public benefits. Against these need to be weighed the economic costs of climate change, which have been the subject of on-going analysis for many years.⁸³ The

⁸² *Health and Wellbeing Technical Report*, p 36.

⁸³ See, e.g., N Stern, J Stiglitz, “Climate Change growth” 32(2) *Industrial and Corporate Change* 277 (2023); W Steffen et al, (2019) “Compound Costs: How climate change is damaging Australia’s economy”:

section on “Economy, trade and finance” in the National Assessment is supported by a *Real Economy Technical Report*, which assessed the likely costs of climate change in various scenarios. The economic and personal costs of not mitigating temperature increase should in each case be weighed against the claimed economic and other benefits. Each of the areas identified in the National Assessment should be addressed. As the Net Zero Commission concluded:⁸⁴

The full climate impacts of further coal extraction should be considered in all cases.

E ARE FURTHER APPROVALS TENABLE?

In Finding 4, the Net Zero Commission explicitly stated:

Continued extensions or expansions to coal mining in NSW are not consistent with the emissions reduction targets in the Climate Change Act or the Paris Agreement temperature goals it gives effect to.

That finding echoed the reasoning of Preston CJ of LEC in *Gloucester Resources Limited v Minister for Planning*.⁸⁵

[525] There is a causal link between the Project’s cumulative GHG emissions and climate change and its consequences. The Project’s cumulative GHG emissions will contribute to the global total of GHG concentrations in the atmosphere. The global total of GHG concentrations will affect the climate system and cause climate change impacts. The Project’s cumulative GHG emissions are therefore likely to contribute to the future changes to the climate system and the impacts of climate change. In this way, the Project is likely to have indirect impacts on the environment, including the climate system, the oceanic and terrestrial environment, and people.

[526] The approval of the Project (which will be a new source of GHG emissions) is also likely to run counter to the actions that are required to achieve peaking of global GHG emissions as soon as possible and to undertake rapid reductions thereafter in order to achieve net zero emissions (a balance between anthropogenic emissions by sources and removals by sinks) in the second half of this century. This is the globally agreed goal of the Paris Agreement (in Article 4(1)). The NSW government has endorsed the Paris Agreement and set itself the goal of achieving net zero emissions by 2050. It is true that the Paris Agreement, Australia’s NDC of reducing GHG emissions in Australia by 26 to 28% below 2005 levels by 2030 or

<https://www.climatecouncil.org.au/wpcontent/uploads/2019/05/Costs-of-climate-change-report.pdf>; Callahan CW and Mankin JS “Carbon majors and the scientific case for climate liability” 640 *Nature*, 893–901 (2025).

⁸⁴ Spotlight Report, p 42.

⁸⁵ [2019] NSWLEC 7.

NSW's Climate Change Policy Framework do not prescribe the mechanisms by which these reductions in GHG emissions to achieve zero net emissions by 2050 are to occur. In particular, there is no proscription on approval of new sources of GHG emissions, such as new coal mines.

[527] Nevertheless, the exploitation and burning of a new fossil fuel reserve, which will increase GHG emissions, cannot assist in achieving the rapid and deep reductions in GHG emissions that are necessary in order to achieve “a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century” (Article 4(1) of the Paris Agreement) or the long term temperature goal of limiting the increase in global average temperature to between 1.5°C and 2°C above pre-industrial levels (Article 2 of the Paris Agreement). As Professor Steffen explained, achieving these goals implies phasing out fossil fuel use within that time frame. He contended that one of the implications of the carbon budget approach is that most fossil fuel reserves will need to be left in the ground, unburned, to remain within the carbon budget and achieve the long term temperature goal. The phase out of fossil fuel use by the second half of this century might permit a minority of fossil fuel reserves to be burned in the short term. From a scientific perspective, it matters not which fossil fuel reserves are burned or not burned, only that, in total, most of the fossil fuel reserves are not burned. Professor Steffen explained, however, that the existing and already approved but not yet operational mines/wells will more than account for the fossil fuel reserves that can be exploited and burned and still remain within the carbon budget. This is the reason he considered that no new fossil fuel developments should be allowed.

In 2021, the International Energy Agency (IEA) (of which Australia is a member) stated that to achieve the goal of net zero by 2050 there was no scope for opening new fossil fuel extraction developments.⁸⁶ In 2023 the IEA revisited its earlier report and confirmed that finding.⁸⁷

In 2023, the International Panel on Climate Change (IPCC) stated:⁸⁸

Limiting global temperature increase to a specific level requires limiting cumulative net CO₂ emissions to within a finite carbon budget, along with strong reductions in other GHGs. For every 1000 GtCO₂ emitted by human activity, global mean temperature rises by *likely* 0.27°C to 0.63°C (best estimate of 0.45°C). This relationship implies that there is a finite carbon budget that cannot be exceeded in order to limit warming to any given level.

⁸⁶ IEA, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (2021), p 21.

⁸⁷ IEA, *Net Zero Roadmap: A Global Pathway to Keep the 1.5°C Goal in Reach – 2023 Update*, p 16.

⁸⁸ IPCC, *Climate 2023: Synthesis Report, Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, p 83 (references omitted).

This relationship (known as the TCRE) has permitted detailed assessment of the likely effects of fractional increases in temperature which can be attributed to individual projects. The Report continued:⁸⁹

The best estimates of the remaining carbon budget (RCB) from the beginning of 2020 for limiting warming to 1.5°C with a 50% likelihood is estimated to be 500 GtCO₂; for 2°C (67% likelihood) this is 1150 GtCO₂.

These estimates significantly exceed existing and approved fossil fuel extraction projects. As the Net Zero Commission stated in its December 2025 report:

The United Nations Environment Programme estimates that emissions from fossil fuel extraction, production and combustion accounted for 73% of total global greenhouse gas emissions in 2024 (UNEP, 2025, pp. 6–7). In 2023, the IPCC found that without additional abatement, the future CO₂ emissions from existing fossil fuel infrastructure already exceed the remaining carbon budget that would provide a 50% chance of limiting warming to 1.5°C (IPCC, 2023a, pp. 20, Figure 3.5).

The Commission also stated:

A substantial body of academic literature supports the view that a rapid phase out of fossil fuel extraction and combustion including coal mining is needed globally and that countries with advanced economies like Australia are best placed to move first Welsby et al. (2021) found that 95% of coal reserves in the ‘Australia and other OECD Pacific region’—in which Australia is the only major coal producer—must remain unburned to limit warming to 1.5°C. McGlade and Ekins (2015) had already established that this proportion must remain unburned to limit warming to 2°C.

The inference is clear: NSW, which provides (with Queensland) 99% of Australia’s export coal,⁹⁰ cannot, in compliance with Australia’s international obligations, approve any new coal mines or extensions of existing mines. The remaining issue is to identify how that conclusion is to be accommodated within the statutory approval process in NSW.

F FUTURE STEPS

(1) *Denman revisited*

The appellant in *Denman* was unsuccessful in its challenge to the manner in which the IPC treated scope 3 emissions from the final combustion of the coal. In fact, the IPC treated the issue in precisely the way that the Departmental guidance (in keeping with Technical Note 9) suggested. That approach must now be seen to be erroneous: it

⁸⁹ Ibid, p 82, par 3.3.1.

⁹⁰ NZC Spotlight Report, p 48.

misunderstood the purpose and scope of the Paris Agreement; and it failed to comply with the guidance now given by the Net Zero Commission in accordance with the guiding principles in the Net Zero Act. The analysis in relation to scope 3 emissions failed to have proper regard to a matter of overwhelming importance in the public interest and as a matter of State government policy.

Whether the IPC took proper account of State Government policy at the date of the determination (6 September 2022) need not be addressed here: arguably it did not. The determination predated the commencement of the Net Zero Act on 11 December 2023, but the fact that that Act received the support of both major parties in the Parliament and that it passed from the introduction of the Bill to assent in a mere 60 days, suggests that the policy considerations discussed above predated the commencement of the legislation. As noted above, the Minister's statement in August 2020 gave no support to the opening of new coal mines: the fact that it committed the Government to support for communities to transition away from coal production is inconsistent with a policy supporting new mines and more public expenditure on the transition. The IPC determination undoubtedly predated the ICJ Advisory Opinion given on 25 July 2025; it predated the Net Zero Commission Spotlight Report in December 2025. The decision was only challengeable on the basis of the law as it stood at that time, but that means the decision is of quite limited legal significance.

(2) *Requiring comprehensive assessments*

Abram et al conclude that “[t]he additional global warming attributable to a single fossil fuel project has quantifiable consequences for people and the environment (Fig. 2), and these can be [quantified and] robustly evaluated in a risk assessment framework.”⁹¹

The IPCC has explained that in its Working Group reports, “risk” is:⁹²

The potential for adverse consequences for human or ecological systems, recognising the diversity of values and objectives associated with such systems. In the context of climate change, risks can arise from potential *impacts* of climate change as well as human *responses* to climate change. Relevant adverse consequences include those on lives, livelihoods, health and wellbeing, economic, social and cultural assets and investments, infrastructure, services (including ecosystem services), ecosystems and species.

- In the context of climate change impacts, risks result from dynamic interactions between climate-related hazards with the exposure and vulnerability of the affected human or ecological system to the hazards. Hazards, exposure and vulnerability may each be subject to uncertainty in terms of magnitude and likelihood of occurrence, and

⁹¹ Abram et al, pp 3, 5.

⁹² IPCC, *The concept of risk in the IPCC Sixth Assessment Report: A summary of cross-Working Group discussions: Guidance for IPCC authors*, (September 2020), pp 4-5.

each may change over time and space due to socio-economic changes and human decision-making

The National Risk Assessment reflects that framework, addressing hazard-exposure-vulnerability-response to identify the consequences of climate change for Australia's key systems across multiple warming levels. Combined with the project-specific modelling demonstrated by Abram et al, it provides a recognized national basis for risk assessment of proposed developments.

It is apparent that the IPC has been granting approvals on the basis of impact assessments that should now be seen as manifestly inadequate. Responsibility for preparing compliant environmental impact statements ultimately lies with proponents of projects who bear the onus of establishing that their proposals satisfy the public interest, as fully assessed. However, in large part the responsibility for that continuing state of affairs may be traced to outdated and inadequate policies and guidance relied on by the Department of Planning. It is no longer lawful, either internationally or domestically, to fail to assess the effects of downstream emissions in a manner that properly reflects their likely effects on the global climate system and their consequent harms to both people and the wider environment in Australia and New South Wales as well as in the locality of the project. It is essential that clear and detailed guidance be formulated as to the necessary steps. Further, it should be expressly recognised in Department of Planning guidance to the IPC that the Net Zero Commission's Spotlight Report, prepared by a statutory government agency, is a government policy and provides guidelines which must be addressed by the IPC in assessing individual projects. The Spotlight Report also contains standards against which current Departmental guidance should be reviewed for compliance.

It is essential that there be an additional section in the Planning Regulation in relation to the coverage of an EIS, drawing on the ACS National Risk Assessment and the EU Directive discussed above. It should be along the following lines, but may benefit from the greater detail provided by the ACS National Risk Assessment (set out at p 36 above):

- 1 The proponent's EIS in support of a proposal for State significant development in the form of a new or expanded coal mine must:
 - calculate all GHG emissions for the project's full lifecycle, including scope 3 emissions from third party consumption
 - calculate the scope 3 emissions as a part of any remaining global carbon budget for 1.5°C and well below 2°C Paris temperature goals, taking into account existing approved projects
 - assess both near- and long-term impacts on the climate system, and account for "lag effects" in climate change

- identify the risks of consequential impacts, including in relation to each of the key systems analysed and the key hazards identified by the ACS in the Australian National Climate Risk Assessment
 - identify specific risks of effects on health and well-being, including heat-related mortality, impacts on Indigenous cultural and on vulnerable populations/regions and consequential economic costs
 - employ up-to-date science-based attribution methodologies, including IPCC-endorsed or peer-reviewed publications (e.g. Abram et al).
- 2 The consent authority must consider the above (whether or not adequately addressed in the EIS) and:
- have regard to all calculable effects on the global climate system of burning fossil fuels proposed to be extracted in the course of the proposed development
 - give equal weight to adverse impacts in any part of Australia
 - take account of Australia's economic and social capacity to absorb limitations on exploitation of identified fossil fuel resources
 - take into account any agreement with prospective purchasers to reduce their use of fossil fuels to comply with the Paris goals
 - assess the likely costs to the government of any incremental harm to people, communities and the environment in Australia as compared with the financial benefits from exploitation of the proposed resource
 - provide transparent reasoning on uncertainties and assumptions.

The results of proper risk assessments may, for example, demonstrate significant likely harm to people and the environment in Northern Australia, including the physical effects in the Torres Strait and on the Great Barrier Reef and heat effects on health in Queensland cities. The issues are not properly limited to likely impacts within the boundaries of New South Wales, although risk of harm to people and the environment in NSW is not to be ignored or discounted. The personal and economic effects on people resident beyond the State borders must be properly understood and weighed by the IPC.

That gives rise to a strategic question, namely, whether it is necessary and appropriate to take preemptive action to require relevant government authorities to bring their policies and guidance into line with their obligations under the Net Zero Act now, rather than after applications for approval of fossil fuel projects are received. Indeed, the Secretary's current timelines for handling such proposals may be too tight to permit compliance with the statutory (and general law) obligations as they now stand. An example may be seen in the successful challenge to the inadequate EPA Policy Statements in 2021, discussed above.

(3) Compliance costs

Much valuable work is being (and continues to be) undertaken by climate scientists. Further, the National Risk Assessments undertaken by the Australian Climate Service provide a framework of issues to be addressed. However, the extensive nature of the assessments now (entirely appropriately) required should not be left to concerned citizens and local environmental groups. Clearly these are national issues which ultimately require national solutions.

If the Commonwealth (being the responsible “State” under international law) cannot be persuaded to shoulder its responsibilities under international law, the State governments (particularly NSW and Queensland in relation to coal) should ensure that proponents, which bear the onus of satisfying the IPC of the public interest in their projects, bear the costs of obtaining the requisite evidence.

(4) Judicial Review

The supervisory jurisdiction of superior courts provides the mechanism for determining whether administrative bodies and inferior courts are complying with their legal obligations. This involves a retrospective analysis of what the body with a duty to act has done. It is generally not an opportunity to present evidence and arguments which were not presented to the body under review, although arguments based on jurisdictional constraints can be presented first to the court, but based on fact-finding by the decision-maker.

These constraints invite attention to the possibility of judicial review prior to a decision. Examples may arise where it appears that essential preconditions to the decision-making process have not been, and will not be, complied with. Consideration may focus on the legality of applicable policies and guidance provided by government departments and agencies, and to the compliance by proponents of new projects with disclosure and evidential obligations, including the adequacy of environmental impact assessments. The desirability of challenging the validity of aspects of policies discussed above, promulgated by the Department of Planning and the EPA, should be considered. It is possible that the confusion which presently exists will be resolved between agencies, in which case the resolution should be examined for compliance with legal obligations.

Proposed reductions in global GHG emissions will involve not only the cessation of new or expanded coal mines, but reductions in currently approved levels of extraction. Further consideration may need to be given to legal powers to vary approvals or the conditions under which mines currently operate and, where such powers exist, whether they are accompanied by a duty to exercise them.



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