

**INQUIRY AND ADVISORY COMMITTEE
FINGERBOARDS MINERAL SANDS PROJECT**

**IN THE MATTER OF THE FINGERBOARDS MINERAL SANDS PROJECT
ENVIRONMENT EFFECTS STATEMENT**

**IN THE MATTER OF DRAFT PLANNING SCHEME AMENDMENT C156 TO THE
EAST GIPPSLAND PLANNING SCHEME**

**PART B SUBMISSIONS
ON BEHALF OF KALBAR OPERATIONS PTY LTD**

INTRODUCTION

- 1 These Part B submissions are made on behalf of Kalbar Operations Pty Ltd ('Kalbar') at the close of its evidence.
- 2 The purpose of these submissions is to summarise Kalbar's case to date and to respond to some of the main issues of principle that have arisen. Kalbar will make further submissions at the close of the hearing.

KALBAR'S CASE

- 3 Kalbar's case consists of:
 - a) The Environment Effects Statement ('the EES');
 - b) The Part A submission;
 - c) This Part B submission;
 - d) The overview of the Project provided by Mr Stefan Wolmarans;
 - e) The overview of rehabilitation activities provided by Dr Gibson-Roy;

- f) The expert evidence (including both the written and oral evidence of the experts and their presentations);
- g) Technical Notes and other information filed by Kalbar with the IAC;
- h) The Response to Submissions attached to the Part A submission; and
- i) The proposed mitigation measures as set out in the Mitigation Register, the Work Plan, and the Incorporated Document.

THE DECISION-MAKING FRAMEWORK

- 4 The conduct of mining activities in Victoria sits at the intersection of a range of decision-making frameworks including, in this case, the licencing regime under the *Mineral Resources (Sustainable Development) Act 1990* ('MRSD Act'), the planning scheme amendment process under the *Planning and Environment Act 1987*, and the works approval under the *Environment Protection Act 1970* ('EP Act').¹
- 5 It is neither practical nor useful to provide a comprehensive account of the operation of these legislative regimes, but Kalbar submits that the following key principles can be derived from them:
- a) First, that outside of the "protected" areas designated under s 6 and 7 of the MRSD Act, there is strong strategic support for the conduct of mining operations across Victoria;
 - b) Second, that strategic support is qualified, but is not overridden, by the need to ensure that the conduct of the mining activities in a particular place can proceed with acceptable economic, social, or environmental impacts;
 - c) Third, in determining whether an appropriate outcome can be achieved, an integrated approach must be taken which considers all aspects of the project.
- 6 In support of these principles, it is important to identify that the key strategic and regulatory framework for the Project is set by the MRSD Act. Other complementary regulatory frameworks also apply, relevantly those concerning radiation protection, water licencing, cultural heritage, environment protection and town planning.

¹ On the coming into force of the *Environment Protection Amendment Act 2018*, the application for a works approval will be converted into an application for a development licence under that Act.

However, each of these apply in a limited way to the Project. In concise terms, the MRSD Act is given primacy by virtue of:

- a) Clause 52.08 (Earth and energy resources industry) of Planning Schemes and ss 42(6)-(7) of the MRSD Act, which oust planning permit requirements for mining undertaken in accordance with the MRSD Act. These ouster provisions apply only to the mining licence area, and the Planning Scheme applies to ancillary works outside this area. However, as Mr Glossop said in his evidence, the town planning implications of the ancillary infrastructure comprising the bore field, Mitchell River pump station and transport infrastructure outside the mine licence boundary are relatively straightforward. Accordingly, the merits of the Project principally, though not solely, fall for consideration pursuant to the MRSD Act.
- b) Schedule 1 of the *Environment Protection (Scheduled Premises) Regulations 2017*, which exempts discharges to land for mining undertaken in accordance with the MRSD Act from licencing and works approval requirements.² Accordingly, EPA's approvals jurisdiction is limited to discharges to surface water and groundwater. It will also have a consultation / advisory role in relation to the mine, and its general powers under the EP Act. However, the mine will be regulated pursuant to the MRSD Act.

Strategic Support

7 The purpose of the MRSD Act provided at s 1 is as follows:

“Purpose

The purpose of this Act is to encourage mineral exploration and economically viable mining and extractive industries which make the best use of, and extract the value from, resources in a way that is compatible with the economic, social and environmental objectives of the State.”

8 This is reaffirmed in s 2(a) of the MRSD Act which identifies one of the objectives of the Act as being to ‘to encourage and facilitate exploration for minerals and foster the establishment and continuation of mining operations’ in Victoria.

² As to the scope of the exemption, note r 8 of the Scheduled Premises Regulations which state that “Section 19A or 20(1) of the Act do not apply in respect to the occupier of any scheduled premises to the extent set out in ... column 3 of the Table in Schedule 1”.

9 Beyond the purposes and objectives of the MRSD Act, the MRSD Act includes other elements that indicate strong policy support for the conduct of mining in Victoria:

a) First, there is the existence of s 42(6) of the MRSD Act.³ That section, in summary, overrides any planning scheme provision that would preclude the grant of a planning permit for mining. The only qualification to this is that the applicant for a planning permit must be the holder a mining licence, meaning that the land to be mined cannot be land which is exempt from the grant of a mining licence under ss 6 and 7 of the MRSD Act. Put another way, Parliament has determined that mining activities are of such importance that the question of what land should be available for mining should be taken away from planning authorities and given to the Minister administering the MRSD Act.

b) Second, the MRSD Act contemplates that, subject to payment of compensation under Pt 8, the holder of a mining licence may be entitled to carry out mining activities on private land owned by third parties. The conferral on a private entity of a right to enter onto land owned by a third party to carry out their own activities is an extremely rare phenomenon in Victorian law, and again underlines the extraordinary degree of support that the State provides for mining activities.

10 Turning to the issue of planning policy specifically, there is express policy support for the conduct of mining activities in the Planning Policy Framework. Relevantly, clause 14.03-1S (Resource exploration and extraction) has the following objective:

“To encourage exploration and extraction of natural resources in accordance with acceptable environmental standards.”

11 Strategies under that clause include:

“Protect the opportunity for exploration and extraction of natural resources where this is consistent with overall planning considerations and acceptable environmental practice.

Recognise the possible need to provide infrastructure for the exploration and extraction of natural resources.

³ See also s 43(3) which provides a similar exemption for exploration.

Ensure planning schemes do not impose conditions on the use or development of land that are inconsistent with the Mineral Resources (Sustainable Development) Act 1990”.

- 12 It is noted that the MRSD Act is a reference document under clause 14.01-3S, underlining Parliament’s desire for a consistent approach to decision-making across different legislative domains.
- 13 This approach is also reflected in clause 52.08 of the East Gippsland Planning Scheme, which is the particular provision dealing with ‘Earth and Energy Resources Industry’. Relevantly, the purposes of that clause are:
- “To encourage land to be used and developed for exploration and extraction of earth and energy resources in accordance with acceptable environmental standards.
- To ensure that geothermal energy extraction, greenhouse gas sequestration, mining and petroleum production are not prohibited land uses.
- To ensure that planning controls for the use and development of land for the exploration and extraction of earth and energy resources are consistent with other legislation governing these land uses.”
- 14 Outside of the MRSD Act and the Planning Scheme, as a factual matter, it is also relevant to note the locational rarity of economic mineral deposits. For example, the Victorian Government’s *State of discovery: Mineral resources strategy 2018–2023* states:⁴
- “Mineral exploration is inherently risky for investors. Mineral exploration is demanding. Globally, the probability of success is low and economic mineral deposits are very rare.”
- 15 The Strategy estimates a conversion rate of 1 in 300 “at best” from exploration to mining, that “from 1993–2017 it has taken 440,000m of exploration drilling, on average, to make a discovery” and that “12 years is the average time from between discovery and production”.⁵ Kalbar’s experience generally accords with these observations, having spent around \$50 million to date in bringing the Fingerboards resource to its current position.
- 16 In relation to mineral sands, ERR’s *Mineral Sands Fact Sheet* notes that there are only five current mineral sands prospects in Victoria, explaining:⁶

⁴ Page 6.

⁵ Page 6.

⁶ Tabled Document 263, p 3.

“There are currently no commercial mineral sands projects operating in Victoria. However, in the 2018/19 financial year, more than \$24 million was spent on mineral sands exploration in Victoria and there are five projects listed here [in the provided map] at various stages of development.”

Economic, social, and environmental considerations, ecologically sustainable development, and acceptable outcomes

17 In saying the above, Kalbar recognises that the high level of strategic support for mining activities provided above is qualified by the need to ensure that the Project has acceptable environmental impacts. For example, s 1 of the MRSD Act encourages mining ‘in a way that is compatible with the economic, social and environmental objectives of the State.’ Similarly, both clause 14.01-3S and clause 58.02 of the Planning Scheme encourage mining where it is in accordance with ‘acceptable environmental standards’.

18 The standard of ‘acceptability’ is the standard reflected in the IAC’s Terms of Reference (‘the Terms’). Clause 5 of the Terms requires the IAC, in its capacity as an Inquiry under the *Environment Effects Act 1978*, to:

“b. consider and report on the potential environmental effects of the project, their significance and acceptability, and in doing so have regard to the draft evaluation objectives in the EES scoping requirements and relevant policy and legislation;

c. identify any measures it considers necessary and effective to avoid, mitigate or manage the environmental effects of the project within acceptable limits, including any necessary project modifications” (emphasis added)

19 Clause 5(b) makes clear that the acceptability of an outcome is to be judged by reference to the Draft Evaluation Objectives (‘the Objectives’) of the Project, as well as relevant policy and legislation (albeit noting that drafting of the Objectives is intended to reflect, among other things, the outcomes sought by the relevant legislation and policy).⁷ The Objectives set in the Scoping Requirements are as follows:

“Resource development – To achieve the best use of available mineral sands resources, in an economic and environmentally sustainable way, including while maintaining viability of other local industries.

Biodiversity – To avoid or minimise potential adverse effects on native vegetation, listed threatened and migratory species and ecological communities, and habitat for

⁷ Section 3.7, p 12.

these species, as well as address offset requirements for residual environmental effects consistent with state and Commonwealth policies.

Water, catchment values and hydrology – To minimise effects on water resources and on beneficial and licensed uses of surface water, groundwater and related catchment values (including the Gippsland Lakes Ramsar site) over the short and long-term.

Amenity and environmental quality – To protect the health and wellbeing of residents and local communities, and minimise effects on air quality, noise and the social amenity of the area, having regard to relevant limits, targets or standards.

Social, land use and infrastructure – To minimise potential adverse social and land use effects, including on, agriculture (such as dairy irrigated horticulture and grazing), forestry, tourism industries and transport infrastructure.

Landscape and visual – To avoid adverse effects on the landscape and recreational values of the Mitchell River National Park and minimise visual effects on the open space areas.

Cultural heritage – To avoid or minimise adverse effects on Aboriginal and non-Aboriginal cultural heritage.

Rehabilitation – To establish safe progressive rehabilitation and post-closure stable rehabilitated landforms capable of supporting native ecosystems and/or productive agriculture that will enable long-term sustainable use of the project area.”

- 20 It is notable that these Objectives generally call for the avoidance or minimisation of adverse impacts. They do not require that there be *no* impacts. This is consistent with the observations of Osborn J in *Rozen v Macedon Range Shire Council* regarding ‘acceptability’, where his Honour stated:

“The test of acceptable outcomes stated in the clause is informed by the notions of net community benefit and sustainable development. An outcome may be acceptable despite some negative characteristics. An outcome may be acceptable because on balance it results in net community benefit despite achieving some only of potentially relevant planning objectives and impeding or running contrary to the achievement of others.”⁸

- 21 This interpretation is also consistent with clause 34(b) and (c) of the IAC’s Terms, which require the IAC’s report to include:

“b. findings on whether acceptable environmental outcomes can be achieved, having regard to legislation, policy, best practice, and the principles and objectives of ecologically sustainable development;

⁸ (2010) 181 LGERA 370, [171]. These observations were endorsed in *Boroondara City Council v 1045 Burke Road Pty Ltd* (2015) 207 LGERA 153 by Warren CJ at [32]; and Garde AJA at [102]-[103].

c. recommendations and/or specific measures that it considers necessary and appropriate to prevent, mitigate or offset adverse environmental effects to acceptable environmental outcomes, having regard to legislation, policy, best practice, and the principles and objectives of ecologically sustainable development”.

22 The reference to the ‘principles and objectives of ecologically sustainable development’ in these paragraphs is important in understanding the correct approach to be taken in determining whether an impact is acceptable. Two principles are of particular relevance to assessment of acceptability:

- a) The first is the principle of integration; and
- b) The second is the principle of proportionality.

The principle of integration

23 The principles of ecologically sustainable development as expressed in MRSD Act, the EP Act, and the *Environment Protection Act 2017* (as amended by the *Environment Protection Amendment Act 2018*) (‘New EP Act’) include the ‘principle of integration’. Relevantly,

- a) Section 2A(2)(f) of the MRSD Act provides:

“both long and short term economic, environmental, social and equity considerations should be effectively integrated into decision-making”

- b) Section 1B(1) and (2) of the EP Act provides:

“(1) Sound environmental practices and procedures should be adopted as a basis for ecologically sustainable development for the benefit of all human beings and the environment.

(2) This requires the effective integration of economic, social and environmental considerations in decision making processes with the need to improve community well-being and the benefit of future generations.”

- c) Section 13 of the New EP Act provides:

“Environmental, social and economic considerations should be effectively integrated.”

24 The operation of this principle was considered by the Victorian Civil and Administrative Tribunal in *Dual Gas Pty Ltd v EPA*. In that case, the Tribunal considered the operation of the principle of integration as set out *State Environment Protection Policy (Air Quality Management)* and stated:

“Insofar as the integration principle in cl 7(1) is concerned, we agree with EV that the purpose of this principle is to ensure that economic, social and environmental issues are given equal attention in decision-making – the so-called ‘triple bottom line’ approach to ecologically sustainable development. This means that development needs are taken into account in applying environmental objectives, and economic development must have regard to its environmental costs. As reflected in cases such as *Telstra Corporation Ltd v Hornsby Shire Council*, the mutual respect and reciprocity between these considerations can only be achieved through an integrated decision-making approach.

The application of this principle thus attempts to maximize the outcome of trade-offs between competing economic, social and environmental values. To this extent, we agree with the concession by EV that the integration principle is intended to pursue *optimal* protection of environmental values rather than *maximum* protection.”⁹

The principle of proportionality

25 The second principle of relevance in assessing acceptability is the principle of ‘proportionality’, which requires the striking of a balance between the level of remaining risk and the cost involved in addressing that risk:

a) Section 2A(2)(e) of the MRSD Act provides that:

“measures to be adopted [to address harm] should be cost effective and flexible, not disproportionate to the issues being addressed, including improved valuation, pricing and incentive mechanisms”

b) Section 1B(3) of the EP Act provides that:

“The measures adopted should be cost-effective and in proportion to the significance of the environmental problems being addressed.”

c) Section 14 of the New EP Act provides that:

“A decision, action or thing directed towards minimising harm or a risk of harm to human health or the environment should be proportionate to the harm or risk of harm that is being addressed.”

26 The principle of proportionality is reflected more broadly in the architecture of the MRSD Act and the New EP Act:

a) Section 2A(1)(b)(i) describes one of the objectives of the MRSD Act as being to establish a framework to ensure that:

⁹ [2012] VCAT 308, [205] – [206] (emphasis original).

“risks posed to the environment, to members of the public, or to land, property or infrastructure by work being done under a licence or extractive industry work authority are identified and are eliminated or minimised as far as reasonably practicable”

b) Section 6(1) of the New EP Act describes ‘the concept of minimising risks of harm to human health and the environment’, and states that a duty requiring minimisation of risk requires the person subject to the duty to:

“(a) to eliminate risks of harm to human health and the environment so far as reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks of harm to human health and the environment, to reduce those risks so far as reasonably practicable.”

c) Section 6(2) then sets out a number of matters to be taken into account in determining what is ‘reasonably practicable’, being the likelihood of a risk occurring, the effect if the risk does occur, the state of knowledge about the risk, the availability of means for managing that risk, and the costs of managing the risk.

27 Accordingly, expressed in terms of the Objective, an acceptable outcome should be understood as one which avoids or minimises adverse impacts to the extent reasonably practicable.

Conclusions

28 The overall effect of the above is that the decision-making framework evinces a policy and regulatory position that valuable minerals should be extracted where economically viable mining can occur, provided it is possible (‘can’) to achieve acceptable economic, social, and environmental outcomes.

KEY ISSUES

29 The purpose of this section is to address a number of key issues that have emerged over the course of the hearing so far. It is not intended to be a comprehensive statement of Kalbar’s position on all the issues, especially given that evidence remains to be heard and tested and submissions made. Kalbar will provide a Part C submission at the end of the hearing to deal with these matters to come.

Planning policy

30 It is submitted that this not primarily a case about planning policy. The clear intent of provisions such as s 42(6) of the MRSD Act is that the acceptability of a proposed mining activity falls to be assessed by reference to its actual impacts and their manageability, rather than questions of consistency with generally applicable policy.

31 To the extent it is relevant, the key planning policy issue appears to be the conflict between the use of land for mining and the use of land for productive agriculture.

32 Insofar as this issue arises in respect of land within the mining licence area, there are two relevant points:

a) First, on 25 July 2019, the Executive Director of Earth Resources Regulation, as delegate of the Minister under the MRSD Act, exempted a large area of the Mitchell River flood plain from the grant of ‘any and all licences under the Act’.¹⁰ The explanation given for this exemption is a combination of the low potential for minerals development and the high productive horticultural and agricultural businesses in the area. Relevantly, however, the Executive Director did not exempt the area subject to the proposed mining licence.

b) Second, in circumstances where a licence can be granted, the MRSD Act provides a specific mechanism for addressing it. Division 4 of Part 2 of the Act provides a mechanism by which an owner or occupier of agricultural land can seek to have their land excised from the area to which a mining licence applies on the basis that:

“there would be greater economic benefit to Victoria in continuing the use of the land as agricultural land than in carrying out the work proposed to be carried out on that land under the licence.”

33 Mr Glossop provided a ‘first principles’ strategic assessment of the whole Project against planning policy, including the supporting infrastructure. In particular, his evidence addressed the possible tensions between policies directed to protection of agricultural land and encouragement for resource extraction.

34 In this regard, whilst clause 14.01-1S (Protection of agricultural land) has the objective to “protect the state’s agricultural base by preserving productive farmland”,

¹⁰ Government Gazette G30, 25 July 2019, p. 1413. The exempted area is depicted in Schedule A on that page.

strategies within this clause emphasise the protection of “farmland that is of strategic significance”.

- 35 At a local level, mapping at clause 21.06 (Natural Resource Management) does not identify the Project land as prime or high quality agricultural land, consistent with findings of the EES that recognise the Project area as productive but not high quality agricultural land.
- 36 It is also relevant that some of the strategies are also qualified by reference to ‘permanent’ removal. Kalbar’s intention – and legal obligation – is to rehabilitate the land in the mining area once mining is complete, at least to the standard of being able to carry out the same activities on that land as could previously have been carried out. In that context, the intention is to avoid permanent removal of agricultural land from production.
- 37 As to resource extraction policy, clause 14.03-1S (Resource exploration and extraction) of the Planning Scheme relevantly provides:

“Objective

To encourage exploration and extraction of natural resources in accordance with acceptable environmental standards.

Strategies

...

Protect the opportunity for exploration and extraction of natural resources where this is consistent with overall planning considerations and acceptable environmental practice.

Recognise the possible need to provide infrastructure for the exploration and extraction of natural resources.

Ensure planning schemes do not impose conditions on the use or development of land that are inconsistent with the *Mineral Resources (Sustainable Development) Act 1990*”.

...

“Policy documents

Consider as relevant:

- *Mineral Resources (Sustainable Development) Act 1990*”

38 Ultimately, in respect of the issue of planning policy, Kalbar submits that if the IAC is satisfied that the Project can achieve acceptable outcomes, then the provision of the infrastructure in the Infrastructure Area is an acceptable outcome in planning terms and should be supported.

Uncertainty

Uncertainty in Impact Assessment

39 The main thrust of the attack on the evidence that has been led to date, and in particular the evidence around potential water related impacts, has been to assert that the level of information provided about those potential impacts in the EES is inadequate, by pointing to matters which, in the view of submitters, have not been fully or satisfactorily investigated.

40 Fundamentally, Kalbar's response to this is to observe that it is not uncommon for there to be a degree of uncertainty in environmental impact assessment. It could even be said that it is uncommon for there to ever be certainty in environmental impact assessments. This is particularly so when what is being assessed is, as here, fundamentally a process – mining – rather than a static objective like a piece of transport infrastructure. As explained in the oral opening, by reference to the decision of *Ulan Coal Mines*¹¹, the fundamental question is whether there is sufficient information to make an informed judgment on the nature of those impacts and the capacity to manage them.

41 Similar approaches have been taken in Victoria as well. For example, there is the recent decision of the Advisory Committee which considered the Ombersley Quarry appeal in 2017. In that case, as here, there was a concern that quarrying might impact on groundwater availability. A substantial body of groundwater evidence was provided, including modelling, but the Advisory Committee concluded:

“The Committee is of the opinion that the extremely non-uniform nature of the hydrological environment is likely to render any model at the best imprecise to wildly inaccurate as a predictive tool at distance away from the area of immediate testing no matter how carefully developed. Developing an accurate model will only ever occur when there is a sufficient time based impact monitoring to support model calibration and validation. No such basis presently exists.”¹²

¹¹ Tabled Document 259.

¹² [2017] PPV 13, section 2.2(i).

42 Notwithstanding the potential for ‘wild inaccuracy’, the Committee went on to state:

“However, the Committee is satisfied that, to the extent possible in this hydrogeological environment, the likelihood and magnitude of impacts which may derive from the quarry development and the situation post closure have been thoroughly evaluated and tested. With a comprehensive water management plan to direct adaptive management of impacts which may become evident over time in the area, the Committee is confident that impacts can be managed effectively and beneficially into the future in respect to the existing farming activities and in environmental preservation.” (Emphasis added.)¹³

43 Consequently, the fact that another party or their experts can identify additional work that could have been done or even, in their view, should have been done, does not lead to the conclusion that there is any material deficiency in the EES or the evidence in support for a positive assessment.

44 It is convenient to note that the Scoping Requirements for an EES do not require a proponent to investigate every issue as far as possible or even as far as practicable. Rather, it requires a proportionate approach where sufficient work is undertaken to appropriately identify and quantify risks of harm and to identify means of managing them. The Scoping Requirements state:

“The level of effort applied to the investigation, management and mitigation of issues in the context of the draft evaluation objectives should be proportionate to the significance of potential adverse effects (Section 4). The proponent should consult closely with DELWP Impact Assessment Unit and the TRG throughout the preparation of the EES to ensure that the investigation of issues is undertaken soundly and appropriately targeted.”¹⁴

45 Having regard to the Terms, it is only if the IAC were to conclude that an impact could not possibly be managed to an acceptable level, or that it could not be sufficiently certain that the risk could be managed, that it ought to recommend refusal.

46 In this context, the proper response to the identification of a data gap is to ask: does the identification of the data gap changes anything? In particular, it is worth asking the following questions:

- a) Does the gap involve the identification of a new risk that has not previously been considered?
- b) Is the risk significant enough to warrant a management response?

¹³ Ibid, section 2.3.

¹⁴ Section 3.7, p. 12.

- c) If a management response is warranted, is that response already addressed by, or readily incorporated into, existing management measures?
- d) If the management measure is not already addressed, and cannot readily be incorporated, can the impact be managed to an acceptable level?

47 In terms of the matters that were put to the expert witnesses, it is noted that, although several witnesses accepted that more information would be useful, none of those witnesses indicated that their impact assessment conclusions would have been materially different had they possessed that information.

48 It should also be noted that, in a number of cases, the ability to resolve these data gaps lay firmly within the grasp of the party asserting that it existed. For example, while it was agreed by all the ecology experts that a survey would need to be undertaken of 2705 Bairnsdale-Dargo Road for the purposes of assessing the native vegetation present on the site, both Mr Lane and Mr Kern were (unlike Mr Organ) given the opportunity to access the site and could have resolved that gap, had they wished to do so.

49 Similarly, insofar as it was sought to criticise the EES for failing to delineate the catchment of thus far unidentified spring fed dams, it could properly be said that the first step in assessing the significance of this data gap would have been for those parties asserting its existence to identify the dams they contend are spring fed, noting that none appear to have been expressly identified.

Uncertainty in mitigation measures

50 A related, but conceptually separate, issue arose in relation to the issue of uncertainty in the design of mitigation measures. In particular, there was a suggestion that it would have been desirable to have provided more detail of the likely content of future adaptive management plans, including matters of detail such as the proposed location of future monitoring bores.

51 This should not be accepted. Kalbar anticipates that, if the IAC offers conditional support for the project, Kalbar will have to continue collecting data prior to commencing mining. This includes gathering additional baseline data, such as additional water data, in light of the increased rain in the area in recent times. In this context, rather than seeking to define trigger levels, etc. now, the prudent course is to

gather the additional information that the witnesses agreed is required in order to ensure that any future adaptive management plan is based on the best information available.

- 52 This approach is consistent with the approach taken by the Inquiry which considered the Mountain View Quarry extension at Point Wilson in 2008. In that case, there was a question about likely prospect of quarrying operations dewatering nearby dry saltmarsh which was used as habitat by the critically endangered Orange Bellied Parrot. The Inquiry accepted that an adaptive management approach was a reasonable one, even though, in that case, it was on the basis of ‘simplistic’ ground water modelling. However, it went on:

“The Panel considers it is not appropriate to specify criteria for adaptive management responses to protect the dry saltmarsh from impacts due to quarrying at this point. Rather these criteria should be determined on the basis of information from the recommended monitoring, which will occur for an extended period prior to extraction in areas that may impact on dry saltmarsh vegetation.”¹⁵

- 53 Equally, in terms of the matters of detail, such as the number and location of monitoring bores, Kalbar submits this, too, is better resolved when the Work Plan is finalised. In the end, the effectiveness of monitoring bores will depend, in large part, on them being appropriately located. What is an appropriate location will, however, depend on the precise activities being undertaken on the site at the time the bores are drilled. In this context, the most important consideration is that there be sufficient regulatory oversight of the adaptive management measures proposed to ensure the assumptions and justifications for adopting the proposed measures are robust and properly tested before those measures are implemented.

Transparency

- 54 A number of questions were to put to the expert witnesses which took as their premise that this hearing was the only opportunity to have the matters in issue tested in a public forum.
- 55 It may be accepted that this is true in respect of decisions under the *Environment Protection Acts* which do expressly exclude third-party rights of review in the Victorian Civil and Administrative Tribunal.

¹⁵ [2008] PPV 124, section 4.1.3.

- 56 Beyond that, however, whether any further hearing is required or permitted is a question to be answered by reference to the statutory framework applicable to the relevant approval.
- 57 In this regard, Kalbar notes that the *Water Act 1989*, in particular, does not provide for any automatic exemption from third party notice as a result of this process. In those circumstances, it will be a matter for the Minister (or his delegates) in considering any water licence application to decide whether there should be notice and submissions and, if so, whether a hearing should be conducted to hear those submission.
- 58 It should also be acknowledged that it is a standard part of a mining project to include an ‘Environment Review Committee’ which receives regular reports about the environmental performance of the Project and will include members of the local community. In Chapter 9 of the EES, Kalbar has committed to appointment of such a Committee. Relevantly, the EES states that Kalbar will:

“Establish an environment review committee to review the environmental performance of the project during construction and operations. Members of the committee would include a range of stakeholders including representatives from the local community, community groups, local and state government, Indigenous groups and small businesses. The committee would be chaired by an independent stakeholder to promote openness and transparency.”

- 59 Similarly, Kalbar has committed to:

“Promote the availability of live dust and noise monitoring results on the project website, which would be accessible to the community and all stakeholders. The data will be collected by monitoring equipment placed at locations throughout the project area and surrounds to check compliance with relevant health and amenity standards and guidelines.”

- 60 In this way, the Project will provide a high degree of ongoing transparency about its impacts and facilitate effective enforcement action by third parties, including local residents. This sort of approach to publicising environmental data is in line with many modern approvals, including those for the West Gate Tunnel or the North East Link Project.

The New EP Act

- 61 The *Environment Protection Amendment Act 2018* will, from 1 July 2021, amend the *Environment Protection Act 2017* (**New EP Act**).

62 The EPA’s opening submissions explains the approach embodied the New EP Act in the following terms:

“35. The New EP Act heralds a transformative shift, introducing a fundamentally different approach to environmental protection. It replaces a regime that has been consequence based. Under the current regime offences are predominantly directed towards pollution and waste impacts to the environment after they have occurred.

36. The new regime shifts its focus to an ongoing duty to prevent pollution and waste in the first place, with the cornerstone being the new environmental duty (GED) at s25. It requires a risk based approach in which harm to human health or the environment from pollution or waste is sought to be eliminated or, if that is not reasonably practicable, that it be reduced as far as reasonably practicable. Failure to comply with the GED is an indictable offence (proof beyond reasonable doubt – a higher evidential standard) and civil penalties (prove on the balance of probabilities – a lower evidential standard) are available for breach.

37. The duty contains a clear hierarchy: elimination is preferred over minimisation of risk. Reasonably practicable places a limit on what needs to be done, balancing risk and cost.”

63 The new legislation will introduce a number of changes that will apply to the Project, relevantly:

- a) It will include a number of statutory duties, notable among these being the general environmental duty (**GED**) to reduce the risk of harm to human health and the environment from pollution and waste ‘to the extent reasonably practicable.’ Other relevant duties include the duty to restore the environment following a pollution incident,¹⁶ the duty to notify EPA Victoria of notifiable pollution incidents,¹⁷ and certain duties relating to priority wastes.¹⁸
- b) The construction of the water treatment facility will require a development licence, and in this respect the current works approval application will be determined as an application for a development licence. The operation of the facility will also require an operational licence.

64 Section 25 establishes the GED as follows:

¹⁶ S.31

¹⁷ S.32

¹⁸ See Part 6.4

“25 General environmental duty

(1) A person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste must minimise those risks, so far as reasonably practicable.

(2) A person commits an offence if the person contravenes subsection (1) in the course of conducting a business or an undertaking.

Penalty: In the case of a natural person, 2000 penalty units;

In the case of a body corporate, 10 000 penalty units.

(3) An offence under subsection (2) is an indictable offence.

(4) Without limiting subsection (1), a person who is conducting a business or an undertaking contravenes that subsection if the person fails to do any of the following in the course of conducting the business or the undertaking, so far as reasonably practicable—

(a) use and maintain plant, equipment, processes and systems in a manner that minimises risks of harm to human health and the environment from pollution and waste;

(b) use and maintain systems for identification, assessment and control of risks of harm to human health and the environment from pollution and waste that may arise in connection with the activity, and for the evaluation of the effectiveness of controls;

(c) use and maintain adequate systems to ensure that if a risk of harm to human health or the environment from pollution or waste were to eventuate, its harmful effects would be minimised;

(d) ensure that all substances are handled, stored, used or transported in a manner that minimises risks of harm to human health and the environment from pollution and waste;

(e) provide information, instruction, supervision and training to any person engaging in the activity to enable those persons to comply with the duty under subsection (1).

65 As described in paragraphs 26b) and c) above, the concept of minimising risks so far as reasonably practicable is codified by s 6 of the New EP Act which provides:

“6 The concept of minimising risks of harm to human health and the environment

(1) A duty imposed on a person under this Act to minimise, so far as reasonably practicable, risks of harm to human health and the environment requires the person—

(a) to eliminate risks of harm to human health and the environment so far as reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks of harm to human health and the environment, to reduce those risks so far as reasonably practicable.

(2) To determine what is (or was at a particular time) reasonably practicable in relation to the minimisation of risks of harm to human health and the environment, regard must be had to the following matters—

(a) the likelihood of those risks eventuating;

(b) the degree of harm that would result if those risks eventuated;

(c) what the person concerned knows, or ought reasonably to know, about the harm or risks of harm and any ways of eliminating or reducing those risks;

(d) the availability and suitability of ways to eliminate or reduce those risks;

(e) the cost of eliminating or reducing those risks.”

66 The Proponent’s witnesses have been cross examined about their awareness of the GED and whether they have factored it in to the Project. Several witnesses conceded that they were unaware of the duty, or only possessed limited familiarity with it.

67 The Proponent’s response to this is that the Project’s design and the assessment processes have intrinsically adopted a risk-based approach of harm minimisation, consistent with the new duties that will apply.

68 First, this is the approach required by the Objectives which, as set out in paragraph 19, generally require that the Project “avoid” or “minimise” potential adverse effects on the matters listed.

69 Second, a risk based approach consistent with the GED is clearly demonstrated through the structure of the impact assessments adopted in the EES, which each adopted a “consequence x likelihood” framework with mitigations applied, even to lower risk items.

70 Third, the prescribed approach and content for work plans, built upon risk identification and management, is also consistent with the GED. As s 40(3) of the MRSD Act relevantly provides:

(3) A work plan must—

..

(b) identify the risks that the work may pose to the environment, to any member of the public, or to land, property or infrastructure in the vicinity of the work; and

(c) specify what the licensee will do to eliminate or minimise those risks as far as reasonably practicable". (our emphasis)

71 The consistency between the GED and the framework under the MRSD Act is recognised in EPA Publication 1823, *Mining and quarrying — Guide to preventing harm to people and the environment* (October 2020) which explains:¹⁹

“You should follow any required risk assessment processes where there are co-regulators involved – for example, ERR’s risk assessment process identified in work plans and work plan variations for mining and quarrying. EPA doesn’t require a separate risk assessment process to be undertaken when you have followed requirements of another co-regulator. EPA’s expectation is that you can demonstrate you have identified and assessed risk.”

72 The Mitigation Register at Appendix H of the EES also demonstrates the approach adopted of using best available measures for avoiding, as a first preference, but otherwise minimising, environmental impacts. Using air quality as an example, the Mitigation Register relevantly provides:

- a) AQ04 Speed limits will be implemented and enforced on unsealed project roads to minimise dust generation.
- b) AQ05 Topsoil stripping will be planned and conducted taking into account forecast and actual weather conditions to minimise dust generation.
- c) AQ08 Haul vehicles will travel on designated haul roads only and haul route lengths will be minimised where practicable.
- d) AQ18 Plant, machinery and vehicles will be maintained regularly in accordance with manufactures’ specifications to minimise emission of particulates.

73 EPA Publication 1823 provides several ‘risk management examples’ for key risks associated with mining, including air quality, chemical spills, dust, groundwater, surface water and noise. The example for dust provides:²⁰

“Dust controls in the site’s environmental management plan include progressively rehabilitating disturbed areas, dampening blast areas pre-blasting, dampening

¹⁹ Page 5.

²⁰ Page 6.

unsealed roads to prevent dust and covering or wetting loads when moving materials. The dust prone roads are also signposted with enforced speed limits.

The company monitors weather and is ready to adjust its activities when conditions are dry and windy.

[The company] regularly checks and keeps a log of controls and equipment to ensure they're working effectively and are maintained. [It] also monitors dust levels near sensitive areas and identifies other present or potential sources of dust.

The company adjusts controls depending on their effectiveness, or if onsite conditions change. They register dust complaints which then trigger a review and possible modification of controls and practices.”

74 These are similar measures to those proposed for the Project.

75 In relation to managing water risks and sediment discharge to waterways, publication 1823 provides the following examples:²¹

“When planning their site layout, the company locates stockpiles away from waterways and floodplains, and incorporates erosion and sediment controls based on rainfall and water flows. They have bunded washdown facilities to capture wastewater. They have designed their water management requirements to separate dirty water from non-dirty water (to minimise water coming into contact with mining activities).

The company minimises the surface area of land exposed through staging vegetation clearing and earthworks. Other controls include revegetation of disturbed areas, seeding or mulching soil stockpiles, road drainage, and contouring and minimising the length and steepness of stockpile slopes.

The company implements controls that respond to seasonal rainfall patterns, and before and after high-rainfall events. They routinely inspect and de-silt their drainage system and erosion and sediment control structures, so they are ready for use.”

76 Again, these are similar measures to those proposed for the Project.

77 It should also be observed that an important change in the New EP Act is that it provides for periodic review of licences issued under the New EP Act, and allows for the EPA to increase the stringency of existing conditions over time. In this context, should further mitigation measures become ‘reasonably practicable’ over time, there is scope for the EPA to require Kalbar to implement those measures.

²¹ Page 7.

78 In summary, the Proponent submits that the Project will be capable of complying with and achieving consistency with the New EP Act in all regards, qualitative and quantitative, both at the time of approval and on an ongoing basis.

EXPERT EVIDENCE TO DATE

79 The IAC has heard evidence from a broad range of experts on behalf of Kalbar. The expertise of those experts was not challenged and, in the main, the work that they had done was not challenged. In fact, in some places it has been expressly endorsed. For example, the Flooding Expert Meeting Statement expressly records Associate Professor Kiem's satisfaction with the flood modelling done to date. Instead, as discussed above, most of the focus of cross-examination was on other or additional work that it was suggested that the experts should have undertaken.

80 Kalbar considers that it is premature to comment in writing on the evidence in relation to topics where all the evidence has not been heard (e.g., radiation, rehabilitation).

Noise and air quality

81 Areas where it is appropriate to make a preliminary comment is in relation to the issues of noise and air quality. The only expert evidence in relation to these matters was given by Mr Delaire and Mr Welchmann for Kalbar.

82 The Amenity and Environmental Quality Objective of the Terms is:

To protect the health and wellbeing of residents and local communities, and minimise effects on air quality, noise and the social amenity of the area, having regard to relevant limits, targets or standards.

83 Notably, this Objective directs attention to relevant 'limits, targets or standards'. In this case, both emissions of noise and air quality are specifically regulated by generally applicable standards published by the EPA, frequently on the basis of national standards.

84 The evidence of Mr Delaire and Mr Welchmann is that the Project is, subject to adoption of appropriate mitigation measures, capable of complying with relevant standards for noise and air quality, including forthcoming standards under the New EP Act, subordinate instruments, and non-statutory guidance. These conclusions were not challenged. In that context, the Committee is in a position to find that the Project can meet those targets.

Economics

- 85 Another area where the evidence has been led is in relation to economics. Here, the evidence was led by MFG from Mr Roderick Campbell.
- 86 While Mr Campbell professed serious scepticism about certain figures used in the BAEconomics economic assessment, he did not give evidence that the Project would not have positive economic effects. As he observed, the spending of significant sums of money within East Gippsland would inevitably have some positive effect on the local economy. He also appeared to concede that the payment of royalties would provide economic benefits at a State and national level.

MITIGATIONS

Mitigation register

- 87 Kalbar continues to consider the evidence and submissions and proposes to file an update Mitigation Register and revised Incorporated Document in due course. It will also take advantage of the ‘on the papers’ without prejudice drafting process for the regulatory instruments.

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