

## Appendix H: Legislative Provisions

### 1. Legislative provisions

- 1.1 The development is State Significant Development (**SSD**): clause 8 and clause 5(1)(a) of Schedule 1, *State Environmental Planning Policy (State and Regional Development) 2011* (NSW); section 89C(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**)).
- 1.2 The Minister for Planning is the consent authority for the development application (section 89D(1), EP&A Act), but the Minister delegated his consent authority function in respect of the development application to the Planning and Assessment Commission (**PAC**) by instrument of delegation dated 14 September 2011 (section 23, EP&A Act).
- 1.3 The factors for consideration set out in section 79C of the EP&A Act apply to the determination of the development application (section 89H, EP&A Act), such that the PAC must:

*“...take into consideration such of the following matters as are of relevance to the proposed development:*

(a) *the provisions of:*

(i) *any environmental planning instrument, and*

(ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*

(iii) *any development control plan, and*

(iia) *any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and*

(iv) *the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and*

(v) *any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),*

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

- (b) *the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) *the suitability of the site for the development,*
- (d) *any submissions made in accordance with this Act or the regulations,*
- (e) *the public interest.”*

- 1.4 The public interest includes community responses regarding the project for which approval is sought. “[C]ommunity responses are aspects of the public interest... in securing the advancement of one of the express objects [of in section 5(c) of the EP&A Act] ‘to provide increased opportunity for public involvement and participation in environmental planning and assessment’ ” (*Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256 (**Telstra Case**) per Preston CJ at 192).
- 1.5 Further, Preston CJ also held at 123 in the *Telstra Case*, that “...[t]he consideration of the public interest is ample enough, having regard to the subject matter, scope and purpose of the [EP&A] Act, to embrace ecologically sustainable development.”
- 1.6 The NSW Court of Appeal has also held that the principles of Ecologically Sustainable Development (**ESD**) are so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act bona fide in the exercise of powers granted to the Minister (*Minister for Planning v Walker* (2008) 161 LGERA 423 at 454; [2008] NSWCA 224 at [56]).
- 1.7 ESD has been held to be “...development that meets the needs of the present without compromising the ability of future generations to meet their own needs”, *Telstra Case* per Preston CJ at 108, citing the World Commission on Environment and Development, *Our Common Future* (1987), page 44, (also known as the *Brundtland Report* after the Chairperson of the Commission, Gro Harlem Brundtland).
- 1.8 The principles of ESD, in particular the precautionary principle, intergenerational equity, and the conservation of biological diversity and ecological integrity, are relevant matters in determining whether to approve the development application.
- 1.9 In relation to the precautionary principle, Preston CJ adopted the most widely employed formulation in the *Telstra Case* at 113:

*“...the precautionary principle... if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.*

*In the application of the precautionary principle, public and private decisions should be guided by:*

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and*
- (ii) an assessment of the risk-weighted consequences of various options."*

1.10 State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW) (**Mining SEPP**) applies to the proposed mine. Pursuant to clause 12, before determining an application for consent for development for the purposes of mining, the consent authority must:

*"(a) consider:*

*(i) the existing uses and approved uses of land in the vicinity of the development, and*

*(ii) whether or not the development is likely to have a significant impact on the uses that, in the opinion of the consent authority having regard to land use trends, are likely to be the **preferred uses of land in the vicinity of the development**, and*

*(iii) any ways in which the development may be incompatible with any of those existing, approved or likely preferred uses, and*

*(b) evaluate and compare the respective public benefits of the development and the land uses referred to in paragraph (a) (i) and (ii), and*

*(c) evaluate any measures proposed by the applicant to avoid or minimise any incompatibility, as referred to in paragraph (a) (iii)."*

- 1.11 Coolmore is of the view that the existing thoroughbred breeding operations carried out on the Property are one of the “*preferred uses of land in the vicinity of the development*” for the following reasons:
- (a) thoroughbred breeding is a long term land use. It is a sustainable, environmentally friendly industry that contributes greatly to the national and State economy; and
  - (b) as referred to above, Coolmore land has been mapped as part of the Equine Critical Industry Cluster as mapped in the *Strategic Regional Land Use Plan – Upper Hunter* (prepared by the then Department of Planning and Infrastructure, September 2012) and on the *Strategic Agricultural Land Map – Sheet STA\_004* of the Mining SEPP. This is a recognition of the strategic importance of Coolmore land by the State Government to the thoroughbred breeding industry. [Insert one line on Mining SEPP].
- 1.12 On 31 August 2015, the Minister for Planning, the Honourable Rob Stokes MP announced that “...*the State’s mining policy will be changed to ensure economic, environmental and social considerations are appropriately balanced when considering mining projects.*”
- 1.13 On 2 September 2015, clause 12AA of the Mining SEPP that required the “*significance of the resource*” to be the principal consideration under Part 3 of the Mining SEPP in determining mining applications to which the SEPP applied, was repealed. The reasons provided by the State Government for the repeal was to bolster community confidence in the assessment process, and to provide a balanced framework for decision makers to assess the likely impacts of state significant mining projects, including relevant social, environmental and economic impacts.
- 1.14 As such, following the repeal of clause 12AA, the PAC is not required to place the “*significance of the resource*” above the other matters it is required to consider under clause 12 (see paragraph 1.10 above) and other provisions in the Mining SEPP.