HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

No S174/2025

BETWEEN:

MACH ENERGY AUSTRALIA PTY LTD
ABN 34608495441
Appellant

and

DENMAN ABERDEEN MUSWELLBROOK SCONE HEALTHY ENVIRONMENT GROUP INC
First Respondent

INDEPENDENT PLANNING COMMISSION OF NSW
Second Respondent

APPELLANT'S SUBMISSIONS

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. This appeal concerns the construction of s 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) (as in force on 6 September 2022): **CAB 216**. Three questions arise, each of which the Appellant contends should be answered "no":

   a. **Ground 1**: Does the requirement in s 4.15(1)(b) to consider the likely impacts of a development, "including environmental impacts on both the natural and built environments, and social and economic impacts in the locality", mean that environmental impacts "in the locality" must be considered?

   b. **Ground 2**: Where a development produces greenhouse gas (**GHG**) emissions, does the requirement in s 4.15(1)(b) to consider the likely impacts of a development, including environmental impacts, require a decision-maker to consider the impacts of climate change as a mandatory relevant consideration?

   c. **Ground 3**: Assuming that the answer to Ground 1 is "yes", is the impact of climate change capable of being considered an environmental impact of a development "in the locality" within the meaning of s 4.15(1)(b)?

3. By notice of contention, the first respondent (**Respondent**) raises a further issue concerning the construction of s 4.15(1)(a)(i) of the EPA Act, read with cl 2.20 of the *State Environmental Planning Policy (Resources and Energy) 2021* (NSW) (**Resources SEPP**). The issue is whether the second respondent, the Independent Planning Commission (**IPC**) was required to consider whether to impose conditions aimed at "Scope 3" emissions to a greater degree than the IPC in fact did: **CAB 219**. The notice of contention will be addressed to the extent necessary in reply.

PART III SECTION 78B NOTICES

4. Notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV DECISIONS OF THE COURTS BELOW

5. The citation for the decision of the primary judge (Robson J of the NSW Land and Environment Court (**NSWLEC**)) is *Denman Aberdeen Muswellbrook Scone Healthy*

Environment Group Inc (INC2200560) v MACH Energy Australia Pty Ltd [2024] NSWLEC 86 (**PJ**): **CAB 5-110**.

6. The citation for the decision of the NSW Court of Appeal (**NSWCA**) (Ward P, Adamson JA, Price AJA) under appeal is *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* [2025] NSWCA 163; 263 LGERA 264 (**JA**): **CAB 120-199**.

PART V FACTS

7. On 22 December 1999, development consent was granted for the construction and operation of an open cut coal mine at Mount Pleasant in the Hunter Valley, NSW: **PJ [7]**.

8. The Mine is located within a longstanding coal mining precinct in the Upper Hunter Valley: Applicant's Book of Further Materials(**AFM**) **194 [6].** The development consent has been the subject of several modifications, and the existing consent authorises the extraction of up to 10.5 million tonnes per annum (**Mtpa**) of run-of-mine (**ROM**) coal, until 22 December 2026: **PJ [8]**.

9. The Appellant purchased the mine in 2016, and commenced mining in 2018: **PJ [7]**.

10. On 19 January 2021, the Appellant lodged a State significant development (**SSD**) application seeking to extend the life of the mine by 22 years to 22 December 2048 and to deepen part of the open cut mining area, allowing for an increase in the mine's peak annual production rate to 21 Mtpa of ROM coal: **AFM 195 [13]** (**Project**).

11. The IPC found that the Project was classified as an SSD under the *State Environmental Planning Policy (State and Regional Development) 2011* (NSW).[1] In accordance with that Policy, and the EPA Act, the IPC is the consent authority for the application, as more than 50 unique submissions by way of objections were made in respect of the Project: **AFM 9**.

12. On 22 January 2021, the Appellant lodged an Environmental Impact Statement (**EIS**) with the NSW Department of Planning and Environment (**Department**): **PJ [10]**. The Department publicly exhibited the EIS from 3 February 2021 until 17 March 2021, and received a large number of submissions from the public: **JA [12]**; **PJ [10], [12]**.

13. On 31 May 2022, the Department forwarded its Assessment Report (**DAR**) to the IPC. The Department concluded that, on balance, the benefits of the Project outweighed its costs and that the Project was approvable: **AFM 97 [340]**. In reaching that conclusion, the Department

[1] See also, more recently, *State Environmental Planning Policy (Planning Systems) 2021* (NSW), cll 2.6-2.7.

specifically considered the matters set out in s 4.15 of the EPA Act: **AFM 35 [71], 95 [320]**. In relation to GHG emissions, the Department noted that the Project's emissions had been accounted for in the NSW GHG emissions projections in the NSW Government's Net Zero Plan: **AFM 11**. The Department stated that it had "carefully weighed the impacts of the project against the significance of the identified coal resources and the socio-economic benefits associated with continued operation of Mount Pleasant until 2048": **AFM 13**. On balance, the Department considered that the residual GHG impacts of the Project were acceptable, particularly as the Project represented a continuation of existing mining activities and would make use of considerable existing infrastructure: **AFM 60 [209].**

14. The IPC held public hearings on 7-8 July 2022: **JA [19]**. It reopened public submissions from 23-30 August 2022 in response to new material regarding a newly differentiated species (the "Legless Lizard") being recorded at the site of the mine: **PJ [14]**.

15. On 6 September 2022, the IPC granted development consent for the Project subject to conditions, and published a "Statement of Reasons for Decision" (**IPC Reasons**): **PJ [15]**. The primary judge described the IPC Reasons as "extensive", extending over 50 pages: **PJ [34]**. The IPC stated that it had carefully considered (inter alia) the EIS, all public submissions on the EIS, and the material presented at the public hearing on 7-8 July 2022: **AFM 195-196 [16]**. Under heading 3.4 "Mandatory Considerations", the IPC specifically and correctly identified the matters it was required to consider under s 4.15(1) of the EPA Act: **AFM 199, PJ [36]**.

16. Because the NSWCA's key conclusion was that the IPC did not consider the environmental impacts of the development in the locality, it is convenient here to reprise the main conclusions in the IPC Reasons. In section 5, the IPC considered the likely impacts of the development, with particular attention to environmental impacts, including: **(a)** noise, including operational noise of the Project and road and rail noise (**AFM 210-212** §5.1); **(b)** dust and air pollution in the Hunter Valley, and its impact on staff, families and horses (**AFM 212-214** §5.2); **(c)** GHG emissions (in particular Scope 1 and Scope 2 emissions, which were the subject of extensive treatment, as well as Scope 3 emissions) (**AFM 214-221** §5.3); **(d)** blast impacts on a cemetery, and other historic heritage items (**AFM 221-222** §5.4, **AFM 238** §5.12.1); **(e)** loss of Aboriginal heritage items (**AFM 222-223** §5.5); **(f)** impacts to water, including surface and groundwater resources (**AFM 223-227** §5.6); **(g)** biodiversity impacts, such as impacts on specified threatened plant and animal species (**AFM 227-230** §5.7); and **(h)** visual impacts, particularly those caused by the eastern waste rock emplacement and rehabilitation of the landform: **AFM 231-233** §5.8-5.9. With the possible

exception of Scope 3 GHG emissions, as addressed in Ground 3 below, it should be observed that each of these matters is an environmental impact "in the locality".

17. In relation to GHG emissions and climate change specifically, the IPC was clearly "alive to the submissions in relation to climate change and greenhouse gas emissions": **PJ [104]**. The IPC Reasons stated that the IPC had "considered all emissions associated with the Project (including Scope 3 emissions) in its assessment and determination": **AFM 219 [151]**. The IPC Reasons made specific mention of submissions to the effect that "the cumulative impact of GHG emissions is … felt globally", and stated that the IPC "recognises the concerns expressed in these submissions": **AFM 219 [152]-[153]**. The IPC's view, which is not suggested in this Court to be unreasonable or irrational, was that Scope 3 emissions "are appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement)": **AFM 219 [150]**. The IPC's conclusion was that GHG emissions for the Project "have been adequately assessed": **AFM 221 [161]**. As the primary judge noted, this was "not a failure to consider the likely impact of Scope 3 emissions as [the Respondent] pleads": **PJ [104]** (emphasis added).

18. The IPC's discussion and treatment of climate change related matters should be understood, as the primary judge observed, in light of the fact that "the existence of climate change (and its negative impact on the environment) was something that did not need to be 'resolved'": **PJ [101]**. It was the predicate of much of the material received by the IPC, not contested by the Appellant, that GHGs would have an adverse impact on anthropogenic climate change. Plainly, as the primary judge observed, the IPC "was aware of, and accepted that, the combustion of coal is a major contributor to anthropogenic climate change, and that the Project's Scope 3 emissions would contribute to this change": **PJ [80]**; **[69], [101], [106]**.

19. After carefully considering "the Material before it", the IPC found that the Project should be approved despite GHG emissions, but subject to "stringent conditions": **AFM 241 [293]**. The primary judge characterised the IPC's decision-making as "polycentric", and fairly summarised its conclusion as being that the "likely impacts of the Project (including the likely impacts of Scope 3 emissions, particularly in light of the Paris Agreement) is not reason enough to refuse approval": **PJ [109]**.

20. By Amended Summons filed on 30 October 2023, the Respondent sought judicial review of the IPC's decision. Relevantly for this appeal, Ground 2 before the NSWLEC alleged that the IPC failed to take account of the mandatory consideration stipulated in s 4.15(1)(b) of the EPA Act, in that it dealt with "an 'accounting' treatment of Scope 3 emissions instead of

considering the direct and indirect impacts of the Project": see extract at **CAB 13**. This ground of review was regarded by Ward P as "obviously correspond[ing] with the issues raised on appeal": **JA [34]**. However, the issue of the proper construction of s 4.15(1)(b) ultimately determined by the NSWCA did not arise at first instance and was not the subject of written submissions before the NSWCA.

21. The primary judge dismissed the Respondent's application on 19 August 2024: **PJ [254]**. Relevantly to the issues in this Court, the primary judge rejected the submission that the IPC had misunderstood and failed to consider s 4.15(1)(b). Given the weight of evidence before the IPC and its acceptance of the effects of climate change, there was no need for the IPC expressly to mention "specific impacts" such as bushfire risk, increased precipitation, changes in precipitation patterns and the like, because these were "largely impacts of climate change generally": **PJ [110]**. Relevantly for the notice of contention, the primary judge found that the proper inference from the IPC's reasoning as a whole was that it had exercised its discretion not to attach conditions specifically directed to Scope 3 emissions, for the reasons it gave: **PJ [78]-[81]**.

22. The appeal to the NSWCA was pursuant to s 58(1) of the *Land and Environment Court Act 1979* (NSW). As Ward P emphasised at **JA [3]** and **[9]**, the appeal did not extend to a merits review of the IPC Reasons, and was not to be turned into an assessment of the adequacy of the IPC's consideration of matters.[2]

23. Relevantly to the issues in this Court, the NSWCA concluded that the IPC had not complied with s 4.15(1)(b) of the EPA Act, because the IPC did not specifically "consider the impact of climate change on the locality (which was the required causal enquiry)": **JA [108]** (Ward P). As Adamson JA put it, the obligation to consider "the likely impacts of the development on the natural and built environment in the locality of the mine, as required by s 4.15(1)(b), required [the IPC] to address these potentially adverse effects [of global warming] in the locality" (emphasis added): **JA [236]**. Relevantly to the notice of contention, the NSWCA rejected the argument that there was a failure to comply with cl 2.20 of the Resources SEPP on the basis that the IPC "considered there to be no need for the imposition of minimisation conditions in relation to the Scope 3 emissions" (**JA [81]** (Ward P)), or at least that it "cannot be inferred that the [IPC] failed to consider whether conditions ought be imposed on Scope 3 emissions": **JA [229]** (Adamson JA). As Ward P

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2 See generally *Minister for Planning v* ***Walker*** [2008] NSWCA 224; 161 LGERA 423 at [35] (Hodgson JA, Campbell and Bell JJA agreeing).

observed, no party had suggested any such conditions, and it was not for the IPC independently to come up with suggested ways of minimising the effect of Scope 3 emissions especially where "it accepted that they were regulated elsewhere": **JA [82]**.

PART VI ARGUMENT

A SUMMARY

24. Section 4.15(1) of the EPA Act sets out the matters that a consent authority is required to "take into consideration". The relevant subparagraph (s 4.15(1)(b)) required the IPC to take into consideration "the likely impacts of [the] development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality". The dispositive reasoning of the NSWCA for allowing the appeal was that the IPC had failed to discharge its duty to consider that matter, specifically because it did not consider the impact of climate change in the locality: **[23]** above. This reasoning was attended by a number of errors. ***First***, the NSWCA wrongly construed s 4.15(1)(b) as if the words "in the locality" controlled the meaning of the whole clause. This was inconsistent with the text, context and purpose of the provision. ***Second***, contrary to settled principles, the NSWCA construed s 4.15(1)(b) at the wrong level of generality by construing it as mandating specific consideration of the impacts of climate change, which of course is only one possible type of "environmental impact". ***Third***, the NSWCA's reasoning embodies an invalid syllogism. The premises of the Court's reasoning were that: the Project's emissions would contribute to climate change; and that climate change would cause impacts to the locality of the Project. The Court invalidly reasoned from these premises to the conclusion that the Project's emissions could cause local climate change impacts.

B TEXT, PURPOSE AND CONTEXT OF STATUTORY PROVISIONS

25. ***General Scheme of the EPA Act.*** The EPA Act institutes a system of environmental planning and assessment for NSW.[3] In the Second Reading Speech, the Minister made clear that the Bill sought to "adopt the comprehensive concept of environmental planning", the nature and content of which was to be understood in light of the enunciated objects of the legislation.[4] The objects of the EPA Act include protection and promotion of the environment in the broadest sense of that word. In the EPA Act, the term "environment" includes "all aspects of the surroundings of humans, whether affecting any human as an

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3 The relevant historical version is the version for 29 July 2022 to 27 November 2022, covering the date of the grant of the SSD Consent on 6 September 2022: see the Annexure to these submissions below.

4 Legislative Assembly (NSW), *Hansard*, 14 November 1979 at 3047.

individual or in his or her social groupings": s 1.4(1) (emphasis added). The breadth of that definition gives significant amplitude to the statutory objects, which include: **(a)** the promotion of "a better environment by the proper management, development and conservation of the State's natural and other resources" (s 1.3(a)); **(b)** the facilitation of "ecologically sustainable development"[5] by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment (s 1.3(b)); and **(c)** the protection of the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats: s 1.3(e).

26. The relevant norm of conduct created by the EPA Act is criminal: the Act relevantly makes it an offence to carry out a development unless the required consent has been obtained and is in force: s 4.2(1)(a). The discretions reposed in the consent authorities are therefore central to the scheme. Parliament conferred the development consent function on different consent authorities, and carefully delineated the processes that the decision-makers should follow in discharging that function. The scheme of environmental planning contemplated by the EPA Act is that development control decisions should be made "in a strategic planning context established by publicly available criteria, determined by planning authorities as part of a process in which the public has had extensive opportunities to participate".[6]

27. Part 4 of the EPA Act is entitled "Development assessment and consent". The main steps in the development consent process established by Part 4 are set out in ss 4.12-4.18, and the regulations. A development application can only be made for development that needs consent: ss 4.9 and 4.12(1). A development consent is then the determination of an application by which the consent was sought.[7] The application is to be made in the form and manner prescribed by the regulations to the relevant consent authority: s 4.12(1). Consultation is required (eg s 4.13(1)), and the consent authority is required to take into consideration any submissions made in accordance with the EPA Act or regulations: s 4.15(1)(d).

28. ***The IPC***. In the case of an SSD, the consent authority may be (and in this case was: see **[11]** above) the IPC: s 4.5(a). The IPC is constituted under Part 2 of the EPA Act as a corporation (s 2.7(1)), with members appointed by the Minister on the basis of expertise (s 2.8), which

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5 "Ecologically sustainable development" has the same meaning it has in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW): s 1.4(1) of the EPA Act.

6 ***Milne*** *v Minister for Planning* ***(No 2)*** [2007] NSWLEC 66 at [26] (Jagot J).

7 *Weston Aluminium Pty Ltd v Environment Protection Authority* [2007] HCA 50; 82 ALJR 74 at [14] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

is not generally subject to the direction or control of the Minister: s 2.7(2). Where the IPC is the consent authority, the Planning Secretary exercises certain functions on behalf of the IPC, including the function of undertaking assessments of the proposed development and providing them to the IPC (s 4.6(b)), and of carrying out community participation requirements: s 4.6(d). The statutory delegation of this function entitles the IPC to rely upon the DAR.

29. ***Environmental Impact Statement.*** If the development is a designated development or SSD, the development application needs to be accompanied by an EIS prepared by or on behalf of the applicant in the form prescribed by the regulations: s 4.12(8). An EIS has been a requirement of the legislative scheme since its inception.[8] This reflected the goal, recorded in the Second Reading Speech, that "decisions affecting the environment can be taken openly, consciously and with full knowledge of the probable consequences of implementing the decision".[9] Part 3 of the *Environmental Planning and Assessment Regulation 2021* (NSW)[10] sets out specific requirements concerning development applications.[11] . It requires (inter alia) that the EIS contain a general description of the "environment likely to be affected by the development", and a detailed description of the aspects of the environment that are "likely to be significantly affected": reg 192(1)(d)(ii). The EIS must also contain an analysis of "the likely impact on the environment of the development, activity or infrastructure": reg 192(1)(d)(iii). The prescribed content of the EIS assists the consent authority to discharge its statutory duty under s 4.15(1)(b), and the language used in the regulation has long mirrored the language of s 4.15(1)(b) and its antecedents.[12]

30. ***Section 4.15(1).*** As noted at **[24]** above, in determining a development application, the consent authority is required "to take into consideration" the matters in s 4.15(1). The listed matters operate at a high level of generality, are non-exhaustive, and confer a wide

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8 ***Hunter Industrial Rental Equipment*** *Pty Ltd v Dungog Shire Council* [2019] NSWCA 147; 101 NSWLR 1 at [280]ff (Preston CJ of LEC) discussing the requirements of the *Environmental Planning and Assessment Regulation 1980* (NSW).

9 Legislative Assembly (NSW), *Hansard*, 14 November 1979 at 3048.

10 The relevant historical version is the version for 17 August 2022 to 13 October 2022, covering the date of the grant of the SSD Consent on 6 September 2022: see the Annexure to these submissions below.

11 The basic requirements for the content of development applications are contained in reg 24, and additional requirements are imposed in respect of proposed SSDs under Div 5 of Pt 3. See also Div 5 of Pt 8, which sets out the specific requirements concerning the EIS that is required to accompany development applications for SSDs.

12 See ***Bell*** *v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86 at 100 (Bignold J): "the relevant expressions used in the two provisions (ie in s 90 [the ancestor to s 4.15] and Sch 2) are virtually identical". His Honour held that the construction of s 90(1)(b) would be "directly relevant and applicable to the question of meaning, scope and application" of the similar language in the regulations.

discretion.[13] The s 4.15(1) matters are "evaluative" in nature,[14] and the NSWCA has concluded that they are not jurisdictional facts.[15] The consent authority is empowered and required to determine which matters are relevant, and how they are engaged.[16] Two of the subparagraphs arise in this proceeding:

a. Section 4.15(1)(a)(i) arises on the notice of contention. It requires the consent authority to take into consideration the provisions of any environmental planning instrument that applies to the land to which the development application relates. Relevantly, the Resources SEPP was one such instrument. As already noted, the notice of contention will be addressed to the extent necessary in reply.

b. Section 4.15(1)(b) is extracted at **[24]** above. As noted above, the relevant "likely impacts" are a matter for determination by the consent authority.[17] To be relevant, the "impact must be one flowing from the development the subject of the development application".[18]

31. On a natural reading, and consistently with its syntax, s 4.15(1)(b) is comprised of a general statement ("likely impacts of [the] development") followed by two limbs, each of which are properly understood as discrete examples of the main kinds of "likely impacts" required to be considered. The ***first*** limb is "environmental impacts on both the natural and built environments". This limb has been held to include both "direct" and "indirect" influences or effects of the proposed development.[19] One example in the caselaw is the environmental impacts of an off-site transmission line required to deliver electrical power to the relevant development.[20] Prior to the NSWCA's decision, this limb had not previously been understood to be directed to or centrally concerned with environmental impacts in the

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13 *Corowa v Goegraphe Point Pty Ltd* [2007] NSWLEC 121 at [42] (Jagot J); *Milne v Minister for Planning* [2006] NSWLEC 745 at [20] (Jagot J).

14 ***El Khouri*** *v Gemaveld Pty Ltd* [2023] NSWCA 78; 256 LGERA 24 at [53] (Leeming JA).

15 *Ross v Lane* [2022] NSWCA 235; 255 LGERA 136 at [4] (Macfarlan JA) and [94] (Basten JA). Beech-Jones JA dissented as to whether the application of cl 4(1)(a)(ii) of SEPP 65 was a jurisdictional fact. The reasoning of the majority was accepted as correct by the NSWCA in *El Khouri* [2023] NSWCA 78; 256 LGERA 24, see eg at [53] (Leeming JA); and followed in ***Bingman*** *Catchment Landcare Group Inc v Bowdens Silver Pty Ltd* [2024] NSWCA 205; 260 LGERA 297 at [99]-[101] (White JA), [119] (Adamson JA agreeing).

16 *Ross v Lane* [2022] NSWCA 235; 255 LGERA 136 at [102] (Basten JA).

17 ***Hoxton Park*** *Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349; 81 NSWLR 638 at [44] (Basten JA, Macfarlan JA agreeing).

18 *Hoxton Park* [2011] NSWCA 349; 81 NSWLR 638 at [44] (Basten JA, Macfarlan JA agreeing) (emphasis added).

19 *Gloucester Resources Ltd v Minister for Planning* [2019] NSWLEC 7; 234 LGERA 257 at [494]-[495] (Preston CJ, LEC), applying *Minister for Environment and Heritage v Queensland Conservation Council* [2004] FCAFC 190; 139 FCR 24 at [53] (Black CJ, Ryan and Finn JJ); *Hoxton Park* [2011] NSWCA 349; 81 NSWLR 638 at [53] (Basten JA, Macfarlan JA agreeing).

20 See *Bingman* [2024] NSWCA 205; 260 LGERA 297 at [71] (White JA, Adamson JA agreeing).

locality. Indeed, in 1997, Bignold J regarded the ancestor to this limb as the "most notabl[e]" of the subparagraphs that did not contain any spatial or geographic limitation.[21] The ***second*** limb is "social and economic impacts in the locality" (emphasis added). "[S]ocial and economic impacts" are those that concern the effects of the development "on the relations between people in their capacity as members of communities and their environment."[22] The term "locality" is not defined in the EPA Act, and its identification is also a question of fact for the consent authority.[23] As would be expected, the nature of the development and its social and economic impacts will influence the scope of "locality" to be considered.[24]

C GROUND 1 – ENVIRONMENTAL IMPACTS IN THE LOCALITY

32. The NSWCA construed s 4.15(1)(b) not as being comprised of an abstract statement followed by two examples, but instead as being centrally concerned with impacts on the locality of the development. Ward P said at **JA [109]** that impacts on the locality of the development is "the essential matter with which s 4.15(1)(b) is centrally concerned" (emphasis added). The NSWCA thus treated the words "in the locality" as applying to (and therefore limiting) the whole of the subparagraph. The language of s 4.15(1)(b) was said to require consideration of the "causal relationship between the Project and its effects on the locality" (**JA [109]** (Ward P), or as requiring "the effect of the project on the locality to be considered": **JA [234]** (Adamson JA). The NSWCA concluded that the IPC had failed to consider the environmental impacts of the Project on the natural and built environments "in the locality", and so failed to have regard to a mandatory consideration: **JA [106]-[109]** (Ward P), **[234]-[238]** (Adamson JA). Given the extensive discussion in the IPC Reasons of other environmental effects in the locality (see **[16]** above), the NSWCA must be understood as having concluded that the IPC was required to consider the impacts of climate change in the locality as a result of the Project.

33. As noted at **[20]** above**,** the NSWCA's construction of s 4.15(1)(b) that gives rise to this ground was not the subject of written submissions. It appears to have arisen from an exchange with Ward P during the Respondent's oral submissions,[25] and was not developed in further detail in oral submissions by either party.

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21 *Bell* (1997) 95 LGERA 86, 95 (Bignold J). This observation was made in relation to an earlier version of the legislation: see further **[41]** below.
22 *Milne (No 2)* [2007] NSWLEC 66 at [23] (Jagot J).
23 ***Randall*** *Pty Ltd v Willoughby City Council* [2005] NSWCA 205; 144 LGERA 119 at [42] (Basten JA).
24 *Milne v Minister for Planning (No 2)* [2007] NSWLEC 66 at [24] (Jagot J).
25 NSWCA transcript, 26 May 2025, p 4:18-21: **AFM 268**.

34. In construing s 4.15(1)(b) as attaching the words "in the locality" to both "environmental impacts on both the natural and built environments" and "social and economic impacts", the NSWCA erred. Their Honours did not articulate a textual or precedential rationale for this construction. It is inconsistent with the text, syntax, context and purpose of the provision.

35. ***First***, the NSWCA's construction is inconsistent with basic sentence structure of s 4.15(1)(b). The subparagraph articulates the matter for consideration at the most general level of abstraction ("the likely impacts of that development"). At that level of abstraction, the text supplies no spatial or geographical limitation (and there is no contextual reason for any such limitation given the breadth of the environmental goals in the legislation: see **[25]** above). The word "including" functions as a preposition, introducing two examples of impacts which (in the natural reading of the subparagraph) are the most significant (but non-exhaustive) types of "likely impacts" that need to be considered. The phrase "in the locality" attaches to (and limits) only <u>one</u> of the examples (ie "social and economic impacts in the locality"). The other example ("environmental impacts") is not expressed as being subject to any spatial or geographic limitation. To construe s 4.15(1)(b) as being "centrally concerned" with impacts <u>on the locality</u> is therefore to treat the phrase "in the locality" as if it controlled the whole of the subparagraph. This is an idiosyncratic reading. It allows one of the (non-exhaustive) examples to drive and limit the central concern of the whole.

36. ***Second***, the NSWCA's construction ignores the punctuation in the sentence. The comma appearing after the word "environments" is an Oxford or "serial" comma, which functions as a disambiguating punctuation mark to separate the final item in the series from the coordinating conjunction. This Court, and intermediate appellate courts,[26] have consistently recognised that the insertion of a comma reflects a deliberate demarcation of the words preceding the comma from those following it.[27] Thus, the Oxford comma after "environments" indicates that the "social and economic impacts in the locality" are a distinct matter. The phrase "in the locality" modifies the "social and economic impacts", by identifying <u>where</u> those relevant "impacts" occur (ie "in the locality").

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[26] See, eg, *Keating v Dickson* (1991) 23 NSWLR 433 at 440-441 (Gleeson CJ, Samuels AP and Mahoney JA); *Footscray City College v Ruzicka* [2007] VSCA 136 at [14] (Chernov JA); *AMCI Investments Pty Ltd v Rio Doce Australia Pty Ltd* [2008] QCA 387 at [31] (McMurdo P, Mackenzie AJA and Cullinane J agreeing); ***Mainteck Services*** *Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184; 89 NSWLR 633 at [105] (Leeming JA, Ward and Emmett JJA agreeing).

[27] This contemporary approach reflects a deliberate rejection of a tendency "in earlier times" to take a "hesitant attitude … to the use of punctuation marks as a constructional aid": see *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 98 FCR 168 at [76]-[80] (Katz J, Spender and Drummond JJ agreeing).

37. In construing s 4.15(1)(b), the NSWCA did not pay any regard to this aspect of the text, and the effect of its construction is to ignore the punctuation entirely. This was in error. It was inconsistent with the established presumption that Parliamentary draftspersons are taken to punctuate what they write "in accordance with grammatical principles", and as such Courts should "look at the punctuation in order to interpret the meaning of the legislation as accepted by Parliament".[28] Nothing in the text, or context of s 4.15(1)(b), including its legislative history (see **[41]-[42]** below) justifies displacing that presumption or suggests that it was used "haphazardly".[29] In *Re Collins; Ex parte Hockings*,[30] Toohey and McHugh JJ considered that there was "no reason why the use of a comma … should be discarded or thought to serve no purpose" in construing a statutory definition. Punctuation may "on occasion … influentially" inform statutory meaning.[31]

38. ***Third***, the NSWCA's construction construes the word "in" as meaning "on", so that what must be considered is the overall impact <u>on</u> the environment of the locality rather than specific and identifiable impacts <u>within</u> the locality. As Adamson JA put it at **JA [234]**, "s 4.15(1)(b) requires the effect of the project <u>on</u> the locality to be considered" (emphasis added). President Ward described the need for a "causal enquiry as to the impacts on the locality" at **JA [109]**. That construction was contrary to longstanding authority. In 2005, Basten JA observed that there was "no justification"[32] for a construction which treated the word "in" as meaning "on". In the decision under appeal, the NSWCA did not refer to that authority.

39. ***Fourth***, the NSWCA's construction works to undermine the statutory objects by limiting the relevant environmental impacts that must be considered to impacts that occur "in the locality". The statutory objects include promotion and protection of the environment in the broadest sense, beyond the locality in which the development is occurring: **[25]** above. It has long been recognised in planning law that developments give rise to "what are commonly called external costs", ie the "consequences involving loss or expenditure by other persons or the community at large".[33] The scheme of the EPA Act is to require consent authorities to consider those costs, including (centrally) impacts on the "environment" – a term which

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28 *Hanlon v Law Society* [1981] AC 124, 198, quoted in Herzfeld and Prince, *Interpretation* (3rd ed, 2024) [5.50].
29 See *Mainteck Services* [2014] NSWCA 184; 89 NSWLR 633 at [105] (Leeming JA, Ward and Emmett JJA agreeing).
30 [1989] HCA 42; 167 CLR 522 at 525.
31 *Mainteck Services* [2014] NSWCA 184; 89 NSWLR 633 at [105] (Leeming JA, Ward and Emmett JJA agreeing); see also *Houston v Burns* [1918] AC 337 at 348 (Lord Shaw of Dunfermline).
32 *Randall* [2005] NSWCA 205; 144 LGERA 119 at [42] (Basten JA).
33 *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at 771 (Lord Hoffman).

is very broadly defined to include "all aspects of the surroundings of humans": s 1.4(1) (emphasis added); **[25]** above. Section 4.15(1)(b) is the relevant part of the statutory scheme that requires such consideration. By treating impacts on the locality of the development as "the essential matter with which s 4.15(1)(b) is centrally concerned" (**JA [109]**), perversely in the context of anthropogenic climate change, the result is to exclude as mandatory any non-local impacts.

40. The absence of a limitation on the proximity to the development within which environmental impacts must occur in order to constitute a mandatory consideration is consistent with the definition of "environment" and the statutory objects. The EPA Act is concerned with promotion and protection of the environment as a whole, not just in the locality of a particular development. Section 4.15(1)(b) is integral to those objects. It should be construed at a level of "high generality",[34] which affords decision-makers latitude to determine the impacts which are of relevance regardless of whether they are "in the locality".[35] It is for the consent authority to determine which impacts are relevant, and how they are engaged: **[30]** above.

41. ***Fifth***, the NSWCA's construction is inconsistent with the legislative history. Prior to 30 June 1998, the mandatory considerations for the determination of a development application were stipulated in s 90 of the EPA Act. Relevantly, the mandatory considerations (now found in s 4.15(1)(b)) appeared as two separate paragraphs of s 90:

    a. "the impact of that development on the environment" (s 90(1)(b)); and

    b. "the social effect and economic effect of that development in the locality" (s 90(1)(d)).

    Thus, the requirement to consider the environment was not spatially or geographically confined, unlike other paragraphs of s 90 (including s 90(1)(d)).[36] In 1997, Bignold J observed that spatial or geographically constraining expressions (eg "in the locality" or "of the neighbourhood") had been employed in some paragraphs, but "other paragraphs do not contain such express spatial or geographic limitations, for example most notably par (b) which refers to 'the impact of that development on the environment'".[37]

42. On 1 July 1998, s 90 was replaced by s 79C.[38] Section 90(1)(b) became s 79C(1)(b). The

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34 ***Davis*** *v Gosford City Council* [2014] NSWCA 343; 87 NSWLR 699 at [74] (Preston CJ, LEC, Beazley P and Ward JA agreeing).

35 *Randall* [2005] NSWCA 205; 144 LGERA 119 at [40]-[43] (Basten JA, Giles and Santow JJA agreeing).

36 See, eg, EPA Act as in force on 30 June 1998, s 90(1)(c) ("the effect of that development on the landscape or scenic quality of the locality"), (c1) ("the effect of that development on any wilderness area … in the locality"), (h) ("the relationship of that development on adjoining land or on other land in the locality"), (o) (the existing and likely future amenity of the neighbourhood").

37 *Bell* (1997) 95 LGERA 86 at 95 (Bignold J).

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

draftsperson attempted to simplify the considerations. The second reading speech described s 79C as being intended to "streamlin[e] and rationalis[e] the criteria in section 90 of the Act".[39] A departmental White Paper which accompanied an exposure draft of the relevant Bill explained that the amendments to Pt 4 were intended to simplify the matters for consideration in s 90 into a shorter list of five "generic" heads of consideration.[40] The provision was then renumbered as s 4.15 with effect from 1 March 2018.[41] This amendment process achieved no narrowing of the focus of the subparagraph generally, or the environmental impact limb in particular. In 2014, the NSWCA correctly remarked that s 79C(1)(b) was "expressed in words of high generality".[42] There was certainly no legislative intent to narrow the environmental impacts that are required to be considered.

43. Finally, it may be noted that Ward P cited the decision of Preston CJ of the LEC in ***Gloucester*** *Resources Ltd v Minister for Planning* in support of her Honour's construction of s 4.15(1)(b):[43] **JA [107]**. It is difficult to see what support her Honour perceived *Gloucester* as providing for the Court's construction. *Gloucester* concerned the substantive merits of a development application, and the cited paragraphs had nothing to do with considering the impacts of the development on the natural and built environment "in the locality" pursuant to s 4.15(1)(b) of the EPA Act.

D GROUND 2 – LEVEL OF PARTICULARITY OF CONSIDERATION OF ENVIRONMENTAL IMPACTS

44. Ground 2 concerns the level of particularity at which a consent authority is required to consider the "environmental impacts" of a development for the purposes of s 4.15(1)(b). It arises irrespective of the answer to Ground 1.

45. The NSWCA held that s 4.15(1)(b) imposed a requirement on the IPC to conduct a "causal enquiry" as to the impacts of climate change on the environment: **JA [108]-[109]** (Ward P), **[236]-[238]** (Adamson JA). That conclusion was in error.

46. As already noted, both grounds advanced in the NSWCA alleged a failure to take into account mandatory relevant considerations. The Respondent made no allegation of

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39 Legislative Assembly (NSW), *Hansard*, 15 October 1997 at 821-832 (Mr Knowles, Minister for Urban Affairs and Planning).

40 Department of Urban Affairs and Planning (NSW), *Integrated Development Assessment White Paper and Exposure Draft Bill 1997* (**White Paper**) at 18-19 [3.3.1] (available at <https://nswdpe.intersearch.com.au/nswdpejspui/handle/1/2901>).

41 *Environmental Planning and Assessment Amendment Act 2017* (NSW), Sch 4, item 4.2 [1].

42 *Davis* [2014] NSWCA 343; 87 NSWLR 699 at [74] (Preston CJ, LEC, Beazley P and Ward JA agreeing).

43 [2019] NSWLEC 7; 234 LGERA 257 at [514]-[515].

unreasonableness. Instead, it submitted that while the IPC considered the likely impact of emissions causing climate change, "the causal inquiry demanded of it by s 4.15(1)(b) required it to take a further step and consider what likely impacts to the environment were caused by climate change": **AFM 262 [65]**.

47. As is apparent from the terms of s 4.15(1)(b), there is no express requirement to conduct an enquiry of the kind found by the NSWCA not to have been conducted. Instead, s 4.15(1)(b) is expressed in broad and general language.

48. An implication that a consent authority (relevantly the IPC) was obliged to enquire into and consider the impacts of climate change on the environment (whether in the locality of the Project or otherwise) needed to be drawn "primarily, perhaps even entirely" from the subject matter, scope and purpose of the EPA Act, "rather than the particular facts of the case" that the IPC was "called on to consider".[44] It was necessary for the consent authority to be expressly or impliedly obliged by the EPA Act to consider those impacts at the level of particularity identified by the Respondent in order for its submissions on that ground to succeed.[45]

49. Notwithstanding those accepted principles, the NSWCA failed to identify how the subject matter, scope and purpose of the EPA Act gave rise to an implication that in determining a development application pursuant to s 4.15(1) of that Act, a consent authority must conduct a causal enquiry as to the impacts of climate change on the environment (in the locality or otherwise). Such an obligation could not be made out, having regard to the level of generality with which s 4.15(1)(b) is expressed. The obligation imposed by s 4.15(1)(b) is simply to consider "the likely impacts of [the] development", which include environmental impacts.

50. The NSWCA has previously (and correctly, having regard to authority)[46] declined to construe generally expressed mandatory considerations in the EPA Act as requiring

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44 *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 at [73] (McHugh, Gummow and Hayne JJ), citing *Abebe v Commonwealth* (1999) 197 CLR 510 at [195] (Gummow and Hayne JJ). See also *NEAT Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; 216 CLR 277 at [20] (Gleeson CJ); *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

45 *Foster v Minister for Customs and Justice* (2000) 200 CLR 442 at [23] (Gleeson CJ and McHugh J). See also *MCC Energy Pty Ltd v Wyong Shire Council* [2006] NSWLEC 581 at [44] (Jagot J).

46 *Sean Investments Pty Ltd v Mackellar* [1981] FCA 191; 38 ALR 363 at 375 (Deane J), citing *Elliott v Southwark London Borough Council* [1976] 2 All ER 781; [1976] 1 WLR 499. Both of these cases were referred to with approval in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985) 162 CLR 24 at 39, 41 (Mason J), 55-56 (Brennan J).

consideration of specific factual or sub-issues. For example, in ***Notaras*** *v Waverley Council*, Tobias JA (with whom Mason P and Hodgson JA agreed) considered that:[47]

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

Justice Tobias considered the risk of the contrary approach to be that the court may "express the conclusion in terms of a recognised ground of review while in truth making a decision on the merits".[48]

51. To similar effect, in relation to the predecessor to s 4.15(1)(b), Preston CJ, LEC accepted a submission that it is "wrong to suggest that a generally expressed head of consideration, such as s 79C(1)(b) of the [EPA Act], requires resolution or factual findings on various subtopics".[49] His Honour held in that case that there was no legal duty to consider the likely impacts of the proposed mine on koalas at the level of particularity advocated by the applicant.

52. As the Full Federal Court observed in a different statutory context, "it is one thing for a statute to imply that regard must be had to a particular subject matter; it is quite another for it to imply that regard must be had to <u>all</u> matters which fall within that subject matter".[50]

53. This Court should similarly conclude that s 4.15(1)(b), which imposes a high-level obligation to consider the "likely impacts of [the] development", including environmental impacts, does not oblige a consent authority to consider specific sub-issues which might be said to be likely environmental impacts of the Project. The breadth of the legislative intent is apparent from the use of the term "environmental impacts", which is a term of wide import and settled meaning in the context of environmental law.[51] The NSWCA was wrong to conclude that s 4.15(1)(b) demanded a significantly more specific causal enquiry as to the impacts of climate change: cf **JA [108]** (Ward P), **[236]-[238]** (Adamson JA).

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47 [2007] NSWCA 333; 161 LGERA 230 at [120], quoting ***Walsh*** *v Parramatta City Council* [2007] NSWLEC 255 at [58] (Preston CJ, LEC), in turn citing (inter alia) *Sean Investments* [1981] FCA 191; 38 ALR 363 at 375 (Deane J). That passage was subsequently cited with approval and applied in *Walker* [2008] NSWCA 224; 161 LGERA 423 at [35] (Hodgson JA, Campbell and Bell JJA agreeing).

48 *Notaras* [2007] NSWCA 333; 161 LGERA 230 at [120] (Mason P and Hodgson JA agreeing), quoting *Walsh* [2007] NSWLEC 255 at [56] (Preston CJ, LEC).

49 *Upper Mooki Landcare Inc v Shenhua Watermark Coal Pty Ltd* [2016] NSWLEC 6; 216 LGERA 40 at [136], [141].

50 *Changshu Longte Grinding Ball Company Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2019] FCAFC 122; 270 FCR 244 at [93]; see also *Sean Investments Pty Ltd v Mackellar* [1981] FCA 191; 38 ALR 363 at 375 (Deane J).

51 See *Bell* (1997) 95 LGERA 86 at 95-100 (Bignold J); *NSW Land and Housing Corporation v Campbelltown City Council* [2002] NSWLEC 18; 126 LGERA 348 at [115] (Bignold J).

54. There is no dispute in this Court, nor was there below, that the environmental impacts of the Project include impacts on the environment caused by climate change, as a result of GHG emissions: **JA [88]** (Ward P), **[148]** (Adamson JA)). However, acceptance of that matter at a factual level cannot import into s 4.15(1)(b) a requirement that a consent authority must conduct a causal enquiry into the impacts of climate change – whether in the locality of the Project or otherwise – in order to comply with the obligation to consider the likely environmental impacts of a development.

55. The effect of the NSWCA's conclusion is that each of the multifarious likely environmental impacts of a development may become a mandatory consideration under s 4.15(1)(b). The present case illustrates the far-reaching ramifications of that conclusion. The IPC referred throughout its reasons to broad-ranging potential environmental impacts of the Project, as identified at [16] above, including noise, dust and air pollution; GHG emissions; impacts on water, including surface and groundwater resources; biodiversity impacts, such as impacts on threatened species, eight plant species and the striped legless lizard; and visual impacts, particularly that caused by the eastern waste rock emplacement and the rehabilitation of the landform.

56. One consequence of the NSWCA's reasoning is that s 4.15(1)(b) obliged the IPC to consider every one of these "potentially adverse effects" (**JA [236]** (Adamson JA)), or otherwise fall into error by "fail[ing] to engage with the essential matter with which s 4.15(1)(b) is centrally concerned – the impacts of the proposed development on the locality of the development": **JA [109]** (Ward P). For the reasons given, that conclusion cannot be justified by the language of s 4.15(1)(b).

E GROUND 3 – IMPACTS OF PROJECT EMISSIONS IN THE LOCALITY

57. Ground 3 arises if the Appellant is unsuccessful on Ground 1, and proceeds on the premise that s 4.15(1)(b), properly construed, requires consideration of the environmental impacts of the development "in the locality". On that premise, Ground 3 is that the NSWCA erred in characterising climate change as an environmental impact of the Project in the locality.

58. The IPC accepted that 98% of the Project's GHG emissions would be Scope 3 emissions, and that those emissions would contribute to global climate change: **AFM 217 [142], 219 [150]**. President Ward reasoned that the IPC was obliged by those findings "to consider the impact of climate change on the locality (which was the required causal enquiry)" (**JA [108]**) and to have "reference to the specific impacts on the locality": **JA [109]** . To similar effect, Adamson JA observed that the impact of the Scope 3 emissions "would be disproportionately

felt in the locality of the project" and that the IPC did not "seek to distinguish between the effects of global warming generally and the effects of climate change in the locality of the project", despite evidence that the locality was particularly susceptible to the effects of global warming: **JA [236]-[238]**.

59. This reasoning pathway reflects a logical fallacy. The *first* premise of the NSWCA's reasoning was that the Project's GHG emissions contribute to global climate change. The *second* premise was that climate change will have an impact on the "locality". The NSWCA concluded from these premises that the IPC needed to consider the impact of climate change caused by the Project on the locality. But this conclusion assumes a necessary and detectable causal link between the Scope 3 emissions of the Project (ie end users burning the coal in various places globally) and the various specific effects of climate change on the locality. This link is not established by the premises.

60. Further, there was no basis for such a link in the material before the IPC. To the contrary, the evidence before the IPC was that, irrespective of where in the world the GHG has been emitted, the "effect of climate change is global": see **PJ [46(2)]**. The IPC specifically acknowledged those submissions: "[s]ome submissions recognised that … the cumulative impact of GHG emissions is still felt globally": **AFM 219 [152]**. The IPC "accepted that the impact of any Scope 3 emissions is still felt globally": **PJ [104]**. Indeed, as the primary judge noted, the evidence before the IPC was that the impacts associated with combustion emissions "cannot be isolated to particular geographical locations": **PJ [131]** (emphasis added). The Respondent's submission to the primary judge was that there was "uncontested evidence before the [IPC] … that the impacts associated with combustion emissions cannot be isolated to a particular geographic location such that all of the Project's greenhouse gas emissions … will increase global temperatures leading to a wide range of environmental damage": **PJ [90]**. In that context, the IPC cannot be criticised for failing to consider specific causal impacts of climate change in the locality.

61. The Appellant accepted and the IPC acknowledged the contribution of coal mining and combustion to anthropogenic climate change, and that the Project's Scope 3 emissions would contribute to anthropogenic climate change globally: **[17]** above. As the primary judge correctly observed, the IPC "was aware of, and accepted that, the combustion of coal is a major contributor to anthropogenic climate change, and that the Project's Scope 3 emissions would contribute to this change": **PJ [80]**; **[69], [101], [106]**. But it does not follow that the Project's Scope 3 emissions contribute in a detectable or meaningful way to a particular local impact of climate change.

62. Section 4.15(1)(b) requires the consent authority to consider "likely impacts" of the development on the locality, ie the only "impacts" that are relevant are those that are attributable to the particular development in the locality. The impact must be one flowing from the development the subject of the application: **[30.b]** above. Accepting that Scope 3 emissions downstream from the Project would contribute to global climate change, it did not follow (as the NSWCA found) that that contribution could cause a likely local impact.

63. The NSWCA did not identify any finding, nor any evidence before the IPC, to warrant the assumption that Scope 3 emissions referable to the Project could lead to a likely environmental impact in the locality. Courts have repeatedly recognised that attribution science is not generally (or presently) understood to permit such specific linkages. For example, in *Environment Council of Central Queensland Inc v Minister for the Environment and Water*, the Full Federal Court (Mortimer CJ and Colvin J, Horan J relevantly agreeing) quoted the European Court of Human Rights as follows:[52]

> In the context of climate change, the key characteristics and circumstances are significantly different. First, there is no single or specific source of harm. GHG emissions arise from a multitude of sources. The harm derives from aggregate levels of such emissions. Secondly, CO_2 – the primary GHG – is not toxic *per se* at ordinary concentrations. The emissions produce harmful consequences as a result of a complex chain of effects. These emissions have no regard for national borders. Thirdly, that chain of effects is both complex and more unpredictable in terms of time and place than in the case of other emissions of specific toxic pollutants.

64. Overseas courts have similarly confronted the difficulty (or, indeed, the impossibility) of demonstrating that any one source of emissions may be causative of climate change impacts in a particular locality.[53] For example, the United States District Court (Northern District of California) observed, in rejecting a claim that the defendant oil, energy and utility corporations caused climate change related injuries in northwest Alaska, that:[54]

> there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, group at any particular point in time … it is not plausible to state which emissions – emitted by whom and at what time in the last several centuries and at what place in the world – "caused" Plaintiffs' alleged global warming related injuries.

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52 [2024] FCAFC 56; 304 FCR 91 at [141], quoting *Verein KlimaSeniorinnen Schweiz v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 53600/20, 9 April 2024) at [415]-[417]. See also at [179]-[180] (Horan J).

53 See also, eg, *Lliuya v RWE AG*, Case No I-5 U 15/17, Higher Regional Court of Hamm, Germany.

54 See, eg, *Native Village of Kivalina v ExxonMobil Corp*, 663 F Supp 2d 863 (ND Cal 2009), 880. The District Court's decision was affirmed by the US Court of Appeals: 696 F 3d 849 (9th Cir 2012).

65. By reasoning in the manner that it did, the NSWCA erred in holding that the impact of climate change was capable of being considered an environmental impact of the Project within the meaning of s 4.15(1)(b).

PART VII ORDERS SOUGHT

66. The Appellant seeks the orders set out in its notice of appeal: **CAB 216-217**.

PART VIII ESTIMATED TIME

67. The Appellant estimates that it will require up to 2.25 hours to present oral argument (including in reply).

Dated: 5 February 2026




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ANNEXURE TO THE APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date(s)
1.	*Environmental Planning and Assessment Act 1979* (NSW)	29 Jul 2022 to 27 Nov 2022	ss 1.3, 1.4, 2.7, 2.8, Pt 4	Version in force at the time of the decision of the Second Respondent	6 Sep 2022
2.	*Environmental Planning and Assessment Act 1979* (NSW)	1 Jan 2018 to 28 Feb 2018	s 79C	The last date the provision was in force	28 Feb 2018
3.	*Environmental Planning and Assessment Act 1979* (NSW)	30 Jun 1998	s 90	The last date the provision was in force	30 Jun 1998
4.	*Environmental Planning and Assessment Amendment Act 1997* (NSW)	As enacted	Sch 1, item 3	For illustrative purposes	N/A
5.	*Environmental Planning and Assessment Amendment Act 2017* (NSW)	As enacted	Sch 4, item 4.2 [1]	For illustrative purposes	N/A
6.	*Environmental Planning and Assessment Regulation 2021* (NSW)	Current	Pt 3; Pt 8, Div 5	For illustrative purposes	N/A
7.	*Land and Environment Court Act 1979* (NSW)	2 Mar 2025 to 4 Sep 2025	s 58	Version in force at the date of the hearing before the Court of Appeal	
8.	*Protection of the Environment Administration Act 1991* (NSW)	Current	s 6	For illustrative purposes	N/A
9.	*State Environmental Planning Policy (Planning Systems) 2021* (NSW)	Current	cll 2.6-2.7	For illustrative purposes	N/A

10.	*State Environmental Planning Policy (Resources and Energy) 2021* (NSW)	2 Mar 2022 to 27 Oct 2022	cl 2.20	Version in force at the time of the decision of the Second Respondent	6 Sep 2022
11.	*State Environmental Planning Policy (State and Regional Development) 2011* (NSW)	As in force on 30 Jul 2020	N/A	The last date the Policy was in force	N/A