HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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10 IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

**MACH ENERGY AUSTRALIA PTY LTD**
**ABN 34608495441**
Appellant

and

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**DENMAN ABERDEEN MUSWELLBROOK SCONE HEALTHY ENVIRONMENT GROUP INC**
First Respondent

**INDEPENDENT PLANNING COMMISSION OF NSW**
Second Respondent

30 **FIRST RESPONDENT'S SUBMISSIONS**

## PART I: CERTIFICATION

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

## PART II: ISSUES

2. This case concerns the NSW Independent Planning Commission's (**IPC's**) treatment of Scope 3 greenhouse gas emissions (**GHG emissions**) in granting development consent to extend the life of an open cut coal mine. The Scope 3 emissions were estimated at 98% of the mine's total emissions and will constitute 0.065% of global annual emissions. As Adamson JA observed in the Court below, this "could not on any view be regarded as other than very significant in terms of its effect on global warming".[1] The issues arising (each of which should be answered "no") are as follows.

3. ***Ground 1:*** Did the NSWCA decide, as a matter of statutory construction, that likely impacts of the development on the environment in s 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPAA**) were confined to impacts in the locality, and even if it did, does this affect the correctness of its ultimate conclusion that the IPC's decision was invalid by reason of its failures to consider identified likely impacts of the development in NSW and the Hunter Valley?

4. ***Ground 2:*** Having regard to the meaning of the words "likely impacts of the development" in s 4.15(1)(b), and the consideration of the chain of consequences of a development that phrase requires, did the NSWCA's conclusion of invalidity involve it erroneously requiring the IPC to have considered the Project's impacts at too specific a "level of particularity"?

5. ***Ground 3:*** Should the appellant be permitted in this Court to take a position different from that which it took in its Environmental Impact Statement (**EIS**) and in the Courts below as to the connection between its Project's GHG emissions and environmental impacts in NSW and the Hunter Valley, particularly in light of various court decisions which have accepted that such connections can be established?

6. ***Notice of Contention:*** Was the NSWCA correct in rejecting the separate ground of invalidity raised by the first respondent (**DAMSHEG**), namely, that the IPC failed to consider, as required by cl 2.20 of the *State Environmental Planning Policy (Resources*

[1] *Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc v MACH Energy Australia Pty Ltd* [2025] NSWCA 163 (**CA**) at [224] (Core Appeal Book (**CAB**) **193**).

*and Energy) 2021* (NSW) (**Resources SEPP**), whether or not to impose conditions relating to the Project's Scope 3 emissions?

## PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

7. No s 78B notice is necessary.

## PART IV: FACTS

8. ***The process leading to the IPC's decision:*** The following facts regarding the process by which the IPC made its decision on 6 September 2022 approving the appellant's development application (**DA**) are relevant to the issues arising.

9. The DA was required, by s 4.12(8) of the EPAA, to be accompanied by an EIS in the form prescribed by the regulations. Clauses 6 and 7 of Sch 2 to the *Environmental Planning and Assessment Regulation 2000* (NSW) (**EPA Regulation 2000**)[2] set out requirements as to the form and content of an EIS. The effect of these provisions is that the appellant was required to provide a general description of the environment likely to be affected by the development (cl 7(1)(d)(ii), Sch 2), identify the likely impacts of the development on the environment (cl 7(1)(d)(iii), Sch 2) and provide "a full description of the measures proposed to mitigate any adverse effects of the development … on the environment" (cl 7(1)(d)(iv) and see also cl 7(1)(e), Sch 2).

10. Additionally, cl 3(1) of Sch 2 required a person responsible for preparing an EIS to apply to the Planning Secretary for the "environmental assessment requirements" with respect to that particular EIS. Clause 3(5) required the Secretary to provide a written statement of those requirements (**SEARs**).

11. The SEARs for the Project were dated 17 February 2020.[3] They required that, in respect of likely impacts of the Project on the environment, "air quality" be addressed as one of the key issues, and in this regard, to include "an assessment of the likely greenhouse gas emissions of the development". The SEARs also required the EIS to address measures to "avoid, minimise, mitigate and/or offset the likely impacts of the development" and

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2 Contrary to AS [29] and footnote 11, the relevant regulation in respect of the DA for the Project was the EPA Regulation 2000. Clause 3(1)(a) of Sch 6 to the *Environmental Planning and Assessment Regulation 2021* (NSW) (**EPA Regulation 2021**) (which commenced on 1 March 2022) provides that the EPA Regulation 2000 "continues to apply instead of this regulation to development applications submitted but not finally determined before 1 March 2022. The appellant's DA was submitted on 19 January 2021, and not (purportedly) determined until the IPC's decision on 6 September 2022.

3 First Respondent's Book of Further Material (**RFM**) 5-14.

"an assessment of whether these measures … represent the full range of reasonable and feasible mitigation measures that could be implemented".

12. The appellant lodged its EIS on 22 January 2021: CA[138] (**CAB 166**). In Section 8.4.1 (**RFM 26** at **53**), the appellant acknowledged that all sources of GHG emissions including from NSW coal mining developments would "contribute in some way to the potential global, national, state and regional effects of climate change": CA[143], [151] (**CAB 167, 170**). The EIS addressed GHG emissions in Section 7.21 and Appendix S. In Sections 7.21.2 and 7.21.3 (**RFM 21-24**; CA[145]-[146], **CAB 168**), the appellant referred to the different types of GHG emissions its Project would generate as "Scope 1", "Scope 2" and "Scope 3" emissions.

13. In Section 7.21.3 of its EIS (**RFM 24**; CA[146], **CAB 168**), the appellant identified the fact that the Project's Scope 1 and Scope 2 emissions would be substantially less than its Scope 3 emissions. The appellant also there accepted that: (i) the Project would contribute to the global total of GHG emissions; (ii) that would thereby contribute to climate change, and climate change's "associated environmental impacts"; and (iii) the Project's contribution in this regard "would be in proportion with its contribution to global greenhouse gas emissions": **RFM 23** (see also CA[145]-[146] (**CAB 168**)).

14. In Section 7.21.5 of the EIS, the appellant identified that climate change projections indicated that average temperatures were likely to increase in NSW: **RFM 24** (CA[147], **CAB 168-169**). In Part 5.3 of Appendix S to the EIS (entitled "Greenhouse Gas Assessment"), the appellant identified that that increase would be greater in the Upper Hunter Valley: **RFM 79** (CA[153], **CAB 170**). In both Section 7.21.5, and in Appendix S (in Part 5.5), the appellant further identified that, in the vicinity of the Project, along with the increase in temperatures: (i) extreme temperature events may increase in frequency; (ii) bushfire activity may become more prevalent; and (iii) heavier rainfall events were likely to become more frequent: **RFM 24** and **81-82**; CA[147], [156] (**CAB 168-169, 171**). There was thus evidence before the IPC, put forward by the appellant in its EIS, that climate change was likely to have a disproportionately greater impact in the vicinity of the Project: CA[236]-[237] (**CAB 196-197**).[4] The appellant did not, in its EIS, propose any conditions to mitigate Scope 3 emissions.

[4] The appellant accepted, in an exchange with Adamson JA, the fact of this disproportionate impact, and noted that it had recognised that disproportionate impact in its EIS: NSWCA transcript, 26 May 2025, T31.41-50: **AFM 295**.

15. The EIS was publicly exhibited from 3 February 2021 until 17 March 2021, in response to which the **Department** of Planning and Environment received a large number of submissions from the public on the Project (CA[12], **CAB 131**).[5]

16. In accordance with s 4.6(b) of the EPAA, the Department undertook an assessment of the development and provided the Department Assessment Report (**DAR**) to the IPC on 1 June 2022 (**AFM 4-126**). The DAR concluded, at [340] (**AFM 97**), that the Project was "approvable". The Department addressed the issue of GHG emissions and recommended conditions to minimise Scope 1 and Scope 2 emissions at [190]-[218] (**AFM 57-61**). It did not recommend any conditions regarding Scope 3 emissions nor did it mention having considered whether any should be imposed.

17. The IPC conducted a public hearing on 7-8 July 2022 at which it heard oral submissions and evidence.[6] It also received written submissions from various persons, including written submissions on behalf of DAMSHEG dated 20 July 2022: CA[19]-[20], [140] (**CAB 133, 166**). In those submissions, DAMSHEG noted, at [42], [374]-[376] (**RFM 116, 118)**, that the appellant had not identified any measures or conditions directed to minimising Scope 3 emissions.[7] DAMSHEG also put before the IPC evidence from Professor Penny Sackett (**Sackett Report**) (see CA[167]-[169], **CAB 174-176**), and 22 "recent publications of leading national and international research bodies regarding [GHG] emissions and the predicted impacts of climate change, the relevance of which was not disputed": CA[20], **CAB 133**.

18. ***The IPC's reasons:*** The IPC was required, by cl 20(2)(c) of Part 1 of Sch 1 to the EPAA, to publish reasons for its decision, which it did on 6 September 2022: **AFM 188-243**. The Reasons (**R**) concerning GHG emissions were in Section 5.3, at R[125]-[161]: **AFM 214-221**. The IPC set out an account of the reporting of GHG emissions, at the international, national and state levels at R[126]-[138] (**AFM 214-216**). It then addressed the Project's estimated GHG emissions at R[139]-[151] (**AFM 216-219**), and then set out its findings, at R[152]-[161] (**AFM 219-221**).

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5 The IPC was required, by s 2.21(1)(d) and s 22 of the EPAA, to comply with the "community participation requirements" set out in Part 1 of Sch 1 to the EPAA. Those requirements, in cll 9, 11 and 14 in Part 1 of Sch 1, included that a DA and an EIS in respect of a State significant development be publicly exhibited for a minimum of 28 days before the DA can be determined.

6 On 9 September 2021, the relevant Minister requested the IPC conduct a public hearing into the Project (pursuant to s 2.9(1)(d) and cl 3(1)(a) of Sch 2 to the EPAA), within 12 weeks of receiving the DAR: CA [13], [139] (**CAB 131, 166**).

7 See also CA[56] (**CAB 143**).

19. As to the impact of GHG emissions on the environment, the IPC: (i) acknowledged that the mining of coal and its combustion is "a major contributor to anthropogenic climate change"; (ii) referred to submissions that recognised that while Scope 3 emissions were not counted towards NSW emissions, the cumulative impact of GHG emissions "is still felt globally"; and (iii) stated that it recognised that "concern", but noted that under the Paris Agreement, Scope 3 emissions (which made up 98% of the Project's emissions) were "attributed" to the country in which they were emitted: R[150]-[153] (**AFM 219**). The IPC did not, in its reasons, address the impacts of GHG emissions and climate change in Australia, in NSW, or in the Hunter Valley.

20. As to conditions to be imposed on the development consent, the IPC referred at R[154] (**AFM 219**) to cl 2.20 of the Resources SEPP. It then identified conditions it had considered and imposed in respect of Scope 1 and Scope 2 emissions, at R[154]-[160] (**AFM 219-221**). The IPC did not refer to having considered whether or not to impose any conditions in connection with Scope 3 emissions. The significance of that is the subject of the respondent's Notice of Contention, which is addressed in Part VI below.

## PART V ARGUMENT

### A. Section 4.15(1)(b)

21. It is convenient to make some general observations about the operation of s 4.15(1)(b) of the EPAA prior to addressing the specific grounds of appeal. *First*, as described above, a detailed process is prescribed by the regulatory framework to facilitate the identification of the likely impacts of the development. *Secondly*, "likely" within s 4.15(1)(b) of the EPAA means a real chance or possibility.[8] This is consistent with the precautionary principle enshrined in the EPAA's objects clause.[9] *Thirdly*, and as contended by DAMSHEG below,[10] the identification of a "likely impact" of development involves causal analysis. As explained by Basten JA (with whom Giles and Macfarlan JJA agreed) in ***Hoxton Park*** *Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349; (2011) 81 NSWLR 638 at [44], "[t]he impact must be one flowing from the

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8 ***Hoxton Park*** *Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349; (2011) 81 NSWLR 638 at [46] (Basten JA, Giles and Macfarlan JJA agreeing).

9 Section 1.3(b) of the EPAA and definition of "ecologically sustainable development" in s 1.4. See further ***Telstra*** *Corporation Limited v Hornsby* Shire Council [2006] NSWLEC 133; (2006) 67 NSWLR 256 at [121]-[122] and [124]-[125] (Preston CJ).

10 Submissions-in-Chief at [6], [45], [47]-[48], [65]-[66]: **AFM 246, 257-258, 262-263**; Written Reply Submissions at [16], [18]: **RFM 60, 62**.

development the subject of the development application: the question is how remote a "likely" impact must be, in order to disqualify it from the scope of the consideration." At [46], his Honour spoke of "the chain of likely consequences". This causal approach has consistently been applied to s 4.15(1)(b) and its statutory predecessors.[11] The same approach has been applied in respect of a Commonwealth statute that required consideration of the "adverse impacts" that an action was "likely to have": see paragraph 36 below. *Fourth*, once a consent authority identifies an impact as a likely impact it must be considered by the consent authority.[12] That is, every likely impact identified by the consent authority must be considered.

## B. GROUND 1

22. The NSWCA was correct to conclude that the IPC had failed to undertake the task required by s 4.15(1)(b) in respect of the Project's GHG emissions. That task required the IPC to consider whether the effects of climate change in NSW and the Hunter Valley (contributed to by the Project's GHG emissions) were likely impacts of the development and if they were, to take them into consideration. To explain why the NSWCA's conclusion was correct, it is necessary to explain: (i) how (contrary to AS[32], [35]-[37], [39]) the NSWCA's reasoning as to the correct construction of s 4.15(1)(b) did not involve it treating the phrase "in the locality" at the end of s 4.15(1)(b) as qualifying and limiting the phrase "environmental impacts on both the natural and built environments"; (ii) that the correct construction of s 4.15(1)(b) (and the one reached by the NSWCA) is that s 4.15(1)(b) requires consideration of the environmental impacts of a development at least in the vicinity or local area of the development; and (iii) that in any event, such consideration was required in this case having regard to the material put before the IPC in the appellant's EIS as to the impacts of climate change in NSW and the Hunter Valley.

23. ***The NSWCA's reasoning:*** Ward P said at CA[109] (**CAB 158-159**) that the language of s 4.15(1)(b) requires "consideration of the causal relationship between the Project and its effects on the locality", and that the provision is "centrally concerned" with the impacts

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11 ***Gloucester Resources*** *Limited v Minister for Planning* [2019] NSWLEC 7; (2019) 234 LGERA 257 at [494]-[495] (Preston CJ of LEC); *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41 at [6]-[8] (Preston CJ of LEC); ***Bingman*** *Catchment Landcare Group Inc v Bowdens Silver Pty Ltd* [2024] NSWCA 205; (2024) 260 LGERA 297 at [81] (White JA, Adamson JA agreeing).

12 *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 340 (Moffitt P); *Hoxton Park* [2011] NSWCA 349; (2011) 81 NSWLR 638 at [53]; cf *Minister for the Environment and Heritage v* ***Queensland Conservation Council*** *Inc* [2004] FCAFC 190; (2004) 139 FCR 24 at [57].

of the proposed development on the locality of the development. Therefore, having found that the IPC did not consider the impacts of climate change on the locality of the Project (CA[106], [108], **CAB 157-158**), her Honour concluded that it had failed to comply with the requirement of s 4.15(1)(b): CA[109], **CAB 158-159**.

24. After noting the requirements in the EPAA for community participation plans and the possibility of public hearings, Adamson JA said that s 4.15(1)(b) "requires the effect of the project on the locality to be considered", and that the evident legislative intention of the provisions of the EPAA is that a consent authority is obliged to take into account "the likely environmental impact of the development in the locality and the views of the community": CA[234]-[235] (**CAB 196**). Her Honour then identified that in this case, the evidence before the IPC (including in the appellant's EIS) established that global warming would have particular impacts in NSW and, disproportionately, in the locality of the Project: CA[236]-[237] (**CAB 196-197**). Adamson JA concluded that the IPC, having not dealt with those matters, failed to comply with s 4.15(1)(b): CA[238], **CAB 197**.

25. Contrary to AS[32], [35]-[37] and [39], the NSWCA did not interpret the phrase "in the locality" at the end of s 4.15(1)(b) as restricting the requirement to consider the likely environmental impacts of a development. The NSWCA also did not conclude that the requirement in s 4.15(1)(b) is thereby "limited" to consideration of likely impacts on the environment in the locality. Consequently, and contrary to AS[38], the references to "on the locality" in CA[109] and CA[234] (**CAB 158-159 and CAB 196**) did not involve their Honours treating "in" within the statutory phrase "in the locality" as if it said "on the locality"; those references were instead their Honours' articulation of the meaning of s 4.15(1)(b) as a whole. Rather, their Honours considered, having regard to the whole of the language used in s 4.15(1)(b), the statutory purpose as evident from the words used in s 4.15(1)(b), and the context provided by other provisions of the EPAA, that the provision requires a consent authority to consider <u>at least</u> the local environmental impacts of a development.

26. ***The correct construction of s 4.15(1)(b):*** Properly construed, s 4.15(1)(b) requires consideration of likely impacts on the environment at least in the vicinity of the development for the following reasons.

27. First, the appellant's construction of s 4.15(1)(b) would produce an absurd result whereby a consent authority would be free to disregard the impacts a development is likely to have in the vicinity of the development, provided it had considered impacts in a geographic location far removed from the development.

28. Secondly, a conclusion that a key focus of s 4.15(1)(b) is the impacts of a development in its vicinity which requires consideration of at least its local environmental impacts is consistent with the EPAA's recognition, evident in its overall scheme, that many of the impacts of a development (for e.g., noise, dust, visual and other amenity impacts) may typically occur in areas local to the development. For example: (i) one object of the EPAA, in s 1.3(j), was to provide increased opportunity for "community participation" in environmental planning and assessment; (ii) pursuant to s 4.5(d) the consent authority for all developments, except for those specified in s 4.5(a) to (c), is the local council, which it can be inferred would have particular familiarity with the local area and how a development might impact it; (iii) pursuant to s 2.23, consent authorities are required to prepare a community participation plan, which must have regard (among other things) to the right of the community to be informed about planning matters that affect it; (iv) when first enacted, s 84 of the EPAA required that written notice of applications for designated developments[13] be given to persons who own or occupy adjoining land and where practicable, such other owners or occupiers of land whose use and enjoyment may, in the opinion of the consent authority, be detrimentally affected by the development, and that notice of the application be exhibited on the land the subject of the application.[14]

29. Thirdly, contrary to AS[41]-[42], the legislative history of s 4.15(1)(b) is consistent with the NSWCA's construction. As at 30 June 1998, s 90(1) of the EPAA set out 27 mandatory considerations. As noted at AS[41], those considerations included: (i) "the impact of that development on the environment" (s 90(1)(b)); and (ii) "the social

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[13] When the EPAA was first enacted, designated developments were developments of the kinds described in Sch 3 to the *Environmental Planning and Assessment Regulation 1980* (NSW). At the time of the appellant's DA, designated developments were developments of the kinds described in Part 1 of Sch 3 to the EPA Regulation 2000. Generally, those schedules covered developments such as heavy industry (including mining and extractive industries) and intensive agricultural industry (such as abattoirs and large piggeries), and a "common element which runs through them is their potential risk to the environment and the cause of concern to residents of land near the development": *Penrith City Council v Water Management Authority (NSW)* (1990) 71 LGRA 376 at 381 (Kirby P, Meagher and Handley JJA).

[14] Similarly, at the time the appellant lodged its application in this case, reg 77 of the EPA Regulation 2000 required that notice of applications for SSDs and designated developments be given to persons who own or occupy adjoining land, and reg 78 required that notice of applications for designated developments be exhibited on the land the subject of the application.

and economic effect of that development in the locality" (s 90(1)(d)). However, those considerations *also* included: (i) the effect of the development on the "landscape or scenic quality of the locality" (s 90(1)(c)); (ii) the effect of the development on any "wilderness area (within the meaning of the *Wilderness Act 1987*) in the locality" (s 90(1)(c1)); (iii) the relationship of the development to development "on adjoining land or on other land in the locality" (s 90(1)(h)); and (iv) "the existing and likely future amenity of the neighbourhood" (s 90(1)(o)) (emphasis added).

30. From 1 July 1998, s 79C(1) replaced s 90(1).[15] Like s 4.15(1),[16] s 79C(1) contained only five mandatory considerations. But, contrary to AS[42], s 90(1)(b) did not "become" s 79C(1)(b), and nor did s 90(1)(b) and (d) alone become s 79C(1)(b). As well as explaining that the amendment was intended to simplify the list in s 90(1) by adopting five more "generic" considerations (at 18-19), the White Paper that accompanied an exposure draft of the relevant Bill also explained (at 47-48) that the consideration that became s 79C(1)(b) covered a "wide range of matters", including "air and water pollution, preservation of trees, loading and unloading of vehicles, any significant effect on threatened species, protected fauna, soil erosion, impact on adjoining land, amenity of the neighbourhood, protection of public health and safety and impact on any items of cultural and heritage significance."[17]

31. Thus, and as confirmed by the NSWCA in *Davis v Gosford City Council*,[18] it can be seen that the new s 79C(1)(b) encompassed not only the old ss 90(1)(b) and (d), but also other considerations in s 90(1) that concerned impacts on the environment, including those noted in paragraph 29 above, each of which had expressly required consideration of impact in the locality or neighbourhood of the development. This is also apparent from the fact that while the old s 90(1)(b) referred only to a singular "impact" on "the" environment, the new s 79(1)(b) (and now s 4.15(1)(b)) referred to "environmental impacts" (plural) on "environments" (both natural and built). This legislative history demonstrates that the re-drafting of the list of mandatory considerations in s 90(1) to the

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15 *Environmental Planning and Assessment Amendment Act 1997* (NSW).

16 Section 79C(1) became s 4.15(1)(b) as a result of the renumbering of the EPAA effected by the *Environmental Planning and Assessment Amendment Act 2017* (NSW).

17 Department of Urban Affairs and Planning, "Integrated Development Assessment: White Paper and Exposure Draft Bill" (February 1997): https://nswdpe.intersearch.com.au/nswdpejspui/handle/1/2901 at 18-19) and 47-48.

18 *Davis v Gosford City Council* [2014] NSWCA 343; (2014) 87 NSWLR 699 at [110] (Preston CJ of LEC, Beazley P and Ward JA agreeing).

streamlined list in s 79C(1) was not intended to permit a consent authority to ignore the effects a development would have on environments in the vicinity or locality of the development.

32. ***The issues raised by the appellant's EIS mandated consideration of the impacts of climate change in NSW and the locality, in any event:*** Regardless of whether s 4.15(1)(b) as a matter of construction requires consideration of likely impacts on natural and built environments in the vicinity of a development in every case, such consideration was required in this case, as Adamson JA held at CA[236]-[237] (**CAB 196-197**).[19]

33. As set out in paragraphs 9 to 14 above, in its EIS the appellant identified that the Project's GHG emissions would contribute to climate change and its associated environmental impacts, and it identified the environmental impacts climate change would have in NSW, and, in a disproportionate way, in the Hunter Valley. The chapeau to s 4.15(1) of the EPAA obliged the IPC to take into consideration such of the matters listed in paragraphs (a) to (e) "as are of relevance to the development the subject of" the DA. The relevant likely environmental impacts of the Project, for the purpose of s 4.15(1)(b), as revealed by the appellant's EIS and the evidence before the IPC, included the specific and disproportionate impacts climate change would have in the Hunter Valley region, and in NSW. The IPC was thus required to consider those impacts, and it failed to do so.

## C. GROUND 2

34. What the appellant complains in Ground 2 (see AS[45]) was an unwarranted causal inquiry by the NSWCA at CA[109] and [238] (**CAB 158-159, 197**) was simply the application of the correct meaning of the phrase "the likely impacts of that development" to the facts. That does not involve any error.

35. The word "impacts" is not defined in the EPAA, and it therefore must bear its ordinary meaning. In the context of s 4.15(1)(b), "impacts" means the effects or influences of an action. There is nothing in the statutory phrase "the likely impacts of that development" which permits a consent authority to limit its consideration of the impacts of a development to only those at the first step in a chain of consequences.[20] What is required is consideration of impacts that flow from the development, as discussed at paragraph 21

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19 If it is necessary, DAMSHEG seeks leave to amend its Notice of Contention to advance this point.

20 *Hoxton Park* [2011] NSWCA 349; (2011) 81 NSWLR 638 at [46] (Basten JA, Giles and Macfarlan JJA agreeing).

above. A number of authorities illustrate this,[21] including *Hoxton Park*, where the proposed development was the construction and operation of a school. Vehicular access to the school would be by way of construction of a new road, which required construction of a bridge through bushland and over a waterway on land owned by the local council. The construction of the bridge was not part of the proposed development, and, being on council land, would not require development consent under Part 4 of the EPAA (but it did require assessment under Part 5).[22] Nonetheless, the construction of the bridge was a likely impact of the development, and so the impacts from that activity on the environment were required to be considered.[23]

36. *Queensland Conservation Council* is also apposite. That case concerned a proposal to construct a dam on the Dawson River. That river, after joining with other rivers, entered the ocean near the Great Barrier Reef World Heritage Area (**Reef**), about 500km from the dam site.[24] Section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) required the Minister, when deciding whether a proposed action was a "controlled action", to consider "all adverse impacts" the action would have or was "likely to have" on the matters protected in Part 3 of that Act, which included World Heritage properties.[25] In deciding that the proposal was not a controlled action with respect to the Reef, the Minister expressly did not take into account the likely increase in irrigation of agricultural land downstream from the dam, which submissions contended had the potential to pollute the rivers that then flowed into the Reef, on the basis that those would be impacts of persons other than the dam's proponent, and thus not impacts of the dam.[26] The Full Court held that s 75 used the word "impact" in its ordinary sense of "influence or effect of an action", that it included direct or indirect influences or effects, and it included effects which are "sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the

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21 See, for example, ***Bell*** *v Minister for Urban Affairs and Planning* [1997] NSWLEC 98; (1997) 95 LGERA 86 at 102 and 104-105 (Bignold J), where the noise and vibration from trains that would service a coal export facility was a likely impact. See also *Bingman* [2024] NSWCA 205; (2024) 260 LGERA 297.

22 *Hoxton Park* at [3] (Basten JA, Giles and Macfarlan JJA agreeing).

23 *Hoxton Park* at [53] (Basten JA, Giles and Macfarlan JJA agreeing).

24 *Queensland Conversation Council* at [10] (Black CJ, Ryan and Finn JJ).

25 *Queensland Conversation Council* at [11] (Black CJ, Ryan and Finn JJ). In *Hoxton Park* at [48], Basten JA (Giles and Macfarlan JJA agreeing) considered the reasoning in this case regarding the meaning of "impacts" in s 75, in the course of his Honour's reasoning concerning the meaning of "likely impacts" in s 79C(1)(b) of the EPAA.

26 *Queensland Conversation Council* at [22] (Black CJ, Ryan and Finn JJ).

action".[27] In light of this meaning, the Minister had erred in confining his consideration of impacts of the construction and operation of the dam.[28]

37. The authorities relied on at AS[50]-[51] do not contradict the construction of s 4.15(1)(b) outlined in paragraphs 21 and 35. None of the authorities referred to in AS[50] concerned the construction of s 4.15(1)(b) (or its differently numbered predecessors), and the passages relied on were not addressing the question of how to construe a statutory provision that imposes a mandatory consideration. Rather, those passages were outlining the caution to be applied when dealing with an allegation of a failure to give "proper, genuine and realistic consideration" to a matter.[29]

38. In *Upper Mooki Landcare Inc v Shenhua Watermark Coal Pty Ltd*,[30] cited in AS[51], the applicant alleged the consent authority had failed to comply with s 79C(1)(b) (the predecessor to s 4.15(1)(b)) in relation to the manner in which it had addressed the impact of a proposed development on koalas. In considering the impacts the development was likely to have on koalas and the measures to mitigate those impacts (including by translocation), the consent authority considered the size of the koala population and the likely success of translocation, but the applicant contended that s 79C(1)(b) required it to make findings about those matters.[31] It was in that context that Preston CJ of the NSWLEC accepted a submission that s 79C(1)(b) did not require the making of factual findings on "subtopics".[32]

39. This case did not involve either DAMSHEG or the NSWCA making an exhaustive list of matters the IPC might have conceivably regarded as relevant, and then attacking its decision for failing to take one particular matter into account (cf AS[50]), or complaining that the IPC failed to make particular or specific findings about an impact of the Project that it otherwise had given consideration to (cf AS[51]). Here, the IPC failed to address at all the climate change impacts of the appellant's Project's GHG emissions, in the form of temperature rises, and increases in extreme weather events, bushfires and heavy

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27 *Queensland Conversation Council* at [53] (Black CJ, Ryan and Finn JJ).
28 *Queensland Conversation Council* at [60]-[61] (Black CJ, Ryan and Finn JJ).
29 *Notaras v Waverley Council* [2007] NSWCA 333; 161 LGERA 230 at [120] (Tobias JA, Mason P and Hodgson JA agreed); *Walsh v Paramatta City Council* [2007] NSWLEC 255; (2007) 161 LGERA 118 at [58] (Preston J, as his Honour then was); *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 at [35] (Hodgson JA, Campbell and Bell JJA agreed).
30 ***Upper Mooki*** *Landcare Inc v Shenhua Watermark Coal Pty Ltd* [2016] NSWLEC 6; (2016) 216 LGERA 40.
31 *Upper Mooki* at [142], [127]-[128] (Preston CJ of LEC).
32 *Upper Mooki* at [136], [141] (Preston CJ of LEC).

rainfall events in NSW and the Hunter Valley, which the appellant itself had specifically identified in its own EIS.

40. In light of the issues raised by the appellant in its EIS, and having regard to the meaning of the phrase "likely impacts of that development" as explained in paragraphs 21 and 35, the task required of the IPC by s 4.15(1)(b) was to consider whether the impacts of the Project's GHG emissions, both in the form of their contribution to climate change, *and* as regards climate change's consequential impacts in NSW and the Hunter Valley (in the form of increased temperatures, and more extreme weather events, bushfires and heavy rainfall events) were likely impacts of the Project, and if they were, to take them into consideration in determining the appellant's DA. The IPC failed to undertake that task, because it confined its consideration to the impacts of the Project on climate change "globally" (at R[150]-[153], **AFM 219**), and so did not consider the consequences to the environment – identified by the appellant itself in its EIS – that flowed from climate change, in NSW and the Hunter Valley. The NSWCA was correct to conclude that the IPC had erred in this way, at CA[109], [238] (**CAB 158-159, 197**).

41. Contrary to AS[55]-[56], the NSWCA's conclusion in this case does not have "far-reaching ramifications", assuming that to be an assertion it would produce unintended or unworkable outcomes. Given the very significant nature of the Project, it is unsurprising that the IPC was presented – in the appellant's EIS – with a set of "broad-ranging potential environmental impacts of the Project" (AS[50]) for consideration. A conclusion that the IPC was required to consider which of those were "likely impacts of that development" and take into consideration each of those that were, reflects the language of s 4.15(1)(b), and is consistent with the objects of the EPAA set out in s 1.3. This issue will be resolved differently in every case depending on the evidence.

## D. GROUND 3

42. The nub of Ground 3 is that the Project's Scope 3 emissions cannot "contribute in a detectable or meaningful way to a particular local impact of climate change": AS[61]. This is sometimes referred to as the "drop in the ocean" argument and has been rejected by courts in Australia and internationally.[33]

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[33] *Gloucester* at [514]-[525]; *Verein KlimaSeniorinnen Schweiz v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 53600/20, 9 April 2024) at [315], [444]; *Asmania et al v* ***Holcim AG*** *(Asmania et al. v. Holcim)*, Cantonal Court of Zug, case A1 2023 9, 19 December 2025, at [5.1.2]; *Held v. State*, 560 P.3d 1235 at 1254 (2024).

43. Ground 3 is an impermissible attempt to depart from the statements which the appellant made and certified[34] in its EIS, and the way in which it ran its case both before the NSWLEC[35] and the NSWCA. In addressing the GHG emissions of the Project in its EIS (a document required by the EPA Regulation 2000 to identify the "likely impacts" of the development) the appellant not only identified how those emissions would contribute to climate change but also set out the particular impacts of climate change in NSW and the Hunter Valley, which involved (at least implicit) acceptance that the Project's GHG emissions would contribute to climate change impacts in the local area: see paragraphs 9 to 14 above.

44. In the NSWCA, the appellant accepted that: (i) its Project would generate GHG emissions including as a result of the combustion of coal it produced; and (ii) that combustion was a "major contributor" to anthropogenic climate change, which has adverse impacts on the environment "including in NSW (wherever emissions occur)".[36] Further, the appellant told the NSWCA that the scientific material before the IPC showed a disproportionate effect on the locality or NSW was "not in contest".[37]

45. The appellant did not, in its EIS (or otherwise before the IPC), or in the Courts below, suggest or contend that, despite it having included climate change impacts in NSW and the Hunter Valley in its EIS, that those impacts could not or ought not be treated as "likely impacts" within the meaning of s 4.15(1)(b) because the Project's GHG emissions would not "contribute in a detectable or meaningful way" (AS[61]) to those impacts. Thus, contrary to AS[63], the NSWCA did not have to identify any "finding" or "evidence before the IPC" to proceed on the basis that the Project's Scope 3 emissions could lead to likely impacts on the environment in the local area. The appellant should not be permitted to depart from that position now.[38]

46. Contrary to AS[63], there is no general recognition by courts that the emissions of a particular development cannot be found to be a cause of environment impacts in a particular area. To start with, an analysis of likely impacts in a planning context is not

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34 As to the requirement for certification of the EIS, see cl 6(f) of Sch 2 to the EPA Regulation 2000.

35 NSWLEC transcript, 9 November 2023, T2.30-35 **RFM 217.** See also T1.24-31, **RFM 216**; T2.9-15, **RFM 217**; T30.33 to T31.7, **RFM 218-219**.

36 Appellant's submissions in the Court of Appeal, dated 10 March 2025 at [2] (and see also [39]): **RFM 221, 237.**

37 NSWCA transcript, 26 May 2025, T31.31-50: **AFM 295**. See also T32.21-23 (**AFM 296**), T33.4-9 (**AFM 297**), T34.18-24 (**AFM 298**), T35.5-19 (**AFM 299**).

38 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; *Water Board v Mostakas* (1988) 180 CLR 491 at 497.

bound by principles of the causation of actual loss in negligence law.[39] Rather, the causal inquiry called for by s 4.15(1)(b) of the EPAA involves a risk-based framework, informed by the principles of ecologically sustainable development, and in particular, the precautionary principle.[40] Questions of remoteness are informed by these principles. As confirmed in *Hoxton Park*, s 4.15(1)(b) of the EPAA is concerned with a chain of consequences: see paragraph 21 above.

47. Despite the observation relied on by the appellant at AS[63] (which is an incomplete quote), in ***Environment Council*** *of Central Queensland Inc v Minister for the Environment and Water*, the Minister found that if coal extracted from a mine contributed to the extent of global emissions, then it would have or was likely to have an indirect impact on matters of national significance including the Great Barrier Reef.[41] Ultimately, in that case, the causation standard was not met because s 527E of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) required that any indirect impacts be *substantially* caused by the action. That limitation does not apply here.

48. In *Gloucester,* Preston CJ found that "[a]ll of the direct and indirect emissions of [the mine there in issue] will impact on the environment. All anthropogenic GHG emissions contribute to climate change".[42] His Honour then concluded "[t]here is a causal link between the Project's cumulative GHG emissions and climate change and its consequences" (emphasis added).[43] In so holding, Preston CJ cited at [522] the Hague District Court in *Urgenda Foundation v The State of the Netherlands* (C/09/456689/HA ZA 13-1396, 24 June 2015): "a sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch living climate."

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39 *Gray v The Minister for Planning* (2006) 152 LGERA 258 at [83]; *Gloucester* at [516]; ***Waratah Coal*** *Pty Ltd v Youth Verdict Ltd (No 6)* [2022] QLC 21 at [1327]-[1329], [1338]-[1340] and [1347] (Kingham P). See also *The State of the Netherlands v Urgenda Foundation* 200.178.245/01, 9 October 2018 (Hague Court of Appeal at [61]) and ***Finch*** *v Surrey County Council* [2024] UKSC 20 at [72]-[74] (Lord Leggatt, with Lord Kitchen and Lady Rose agreeing).

40 See footnote 9 above. See also *Waratah Coal* [2022] QLC 21 at [1937]-[1938] recommending refusal of a mine expansion on the basis of the precautionary principle.

41 [2024] FCAFC 56; (2024) 304 FCR 91 at [41] and [88] (Mortimer CJ and Colvin J).

42 *Gloucester* [2019] NSWLEC 7; (2019) 234 LGERA 257 at [514].

43 *Gloucester* [2019] NSWLEC 7; (2019) 234 LGERA 257 at [514]. at [525] and see at [515]-[524]. See also *Finch* [2024] UKSC 20 at [79]-[85] and particularly [97] (Lord Leggatt, with Lord Kitchen and Lady Rose agreeing).

10 49. Other courts around the world have also accepted a causal link between a particular source of emissions and a particular climate change impact.[44] The near linear relationship between emissions and global warming and the development of climate change attribution science has been recognised in numerous decisions, including in the recent advisory opinion of the International Court of Justice.[45] Consistent with that recognition was the evidence before the IPC in this case, where the Intergovernmental Panel on Climate Change found that "every tonne of $CO_2$ emissions adds to global warming" and that there was a "near-linear relationship between the cumulative $CO_2$ emissions and global warming".[46] It also found "projected changes in [temperature] extremes are larger in frequency and intensity with every additional increment of global warming".[47]

20 50. A consideration of the world's remaining carbon budget[48] also sharpens the focus of the contribution of the Project's GHG emissions to climate change and in turn, adverse effects of climate change around the world including in Australia, New South Wales and the Upper Hunter Valley. As Professor Sackett explained in her report before the IPC, there will be multiple adverse environmental impacts for Australia, New South Wales, and the Upper Hunter Valley at various temperature trajectories.[49] What temperature trajectory is most likely depends on how quickly the world's remaining carbon budget is spent, and the Project was "one of only 650 global similarly sized (in a GHG sense) projects … that will 'spend' humanity's 1.5ºC carbon budget."[50]

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44 *Holcim* at [5.7.1]; Higher Regional Court of Hamm, *Luciano Lliuya v.* ***RWE AG***, Case number I-5 U 15/17 OLG (28 Mar. 2025), pp. 2-6, 38-41 BS 44; *San Juan Citizens Alliance v United States Bureau of Land Management* 326 F Supp 3d 1227, 1249 (D N M, 2018); See also *350 Montana v. Haaland*, 50 F.4th 1254, 1263, 1266, 1268 and 1272 (9th Cir. 2022).

45 International Court of Justice, *Obligations of States in respect of Climate Change (Advisory Opinion)* at [435] to [438]. See also *The Norwegian State, represented by the Ministry of Energy v Greenpeace Nordic and Nature and Youth Norway (Judgment)* (European Free Trade Association Court, E-18/24, 21 May 2025) at [69], [73], [90]-[91] and [99]; ***Pabai*** *v Commonwealth (No 2)* [2025] FCA 796; (2025) 264 LGERA 230 at [227], [285]-[287] and [985].

46 **IPCC, 2021**: *Summary for Policy Makers. In Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* at p.28 (**RFM 207**). This was Attachment J.4 to DAMSHEG's July 2022 submission to the IPC.

47 *Ibid* p.18 (**RFM 197**). See also Sackett Report at [24] (**RFM 126-129**) and [221]-[250] (**RFM 166-170**).

48 The concept of the carbon budget is explained in *Gloucester* at [441] and in *Pabai* at [317]-[326]. See also IPCC, 2021 at p.28 and footnote 43 (**RFM 207**).

49 CA[153] (**CAB 170**) and CA[168]-[169] (**CAB 174-175**); Sackett Report at [172]-[182] (**RFM 148-153**) and [221]-[230] (**RFM 166-169**).

50 Sackett Report at [251]-[264] (**RFM 171-175** ). See also the discussion of the climate scenario approach to causation discussed in *Waratah Coal* [2022] QLC 21 at [1406]-[1409].

## PART VI NOTICE OF CONTENTION

51. DAMSHEG contends that the NSWCA should have found (and erred in not finding) that the IPC's decision was invalid on an additional basis, namely, that the IPC did not comply with s 4.15(1)(a)(i) of the EPAA because it did not take into account the mandatory consideration specified in cl 2.20(1)(c) of the Resources SEPP.

52. Clause 2.20(1)(c) of the Resources SEPP imposes a mandatory obligation[51] upon a consent authority to consider whether or not a consent should be issued subject to conditions aimed at "ensuring that the development is undertaken in an environmentally responsible manner", including to "ensure that GHG emissions are minimised to the greatest extent practicable".

53. DAMSHEG's contention raises two questions, the first of which is whether cl 2.20(1)(c) of the Resources SEPP requires consideration of each of Scope 1, Scope 2 and Scope 3 emissions. An assumption that an equivalently worded earlier SEPP[52] did, underpinned decisions in the NSWLEC and the NSWCA.[53] Assuming the answer is yes, the second question is whether the IPC failed to consider whether or not the consent should be issued subject to what might be called "minimisation conditions" for Scope 3 emissions. Ward P (at CA[81]-[83], **CAB 150-151**) and Adamson JA (at CA[229]-[232] **CAB 194-195**) resolved this second question adversely to DAMSHEG and so did not address the first question.

54. ***Statutory construction:*** In *Mulalley,* Preston CJ of the NSWLEC considered the predecessor to cl 2.20 (cl 14 of the Mining SEPP), and held that the ordinary meaning of "greenhouse gas emissions" in cl 14(1)(c) encompassed Scope 3 emissions and the inclusion of the words "including downstream emissions" in cl 14(2) was confirmatory

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51 ***KEPCO*** *Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* [2021] NSWCA 216; (2021) 250 LGERA 39 at [43] (Basten and Payne JJA) and at [93] and [142] (Preston CJ in LEC).

52 Clause 14 of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) (**Mining SEPP**).

53 *Gloucester* [2019] NSWLEC 7; (2019) 234 LGERA 257 at [491]-[492] (Preston CJ in LEC); *KEPCO* [2021] NSWCA 216; (2021) 250 LGERA 39 at [43] (Basten and Payne JJA) and at [93] and [142] (Preston CJ in LEC); *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110; (2021) 252 LGERA 221 at [99]-[103] (Preston CJ in LEC).

of that ordinary meaning, rather than extending it.[54] Downstream emissions include Scope 3 emissions.[55]

55. Clause 2.20(1)(c) should be construed as requiring a consent authority to separately consider whether or not to impose minimisation conditions for Scope 1, Scope 2 and Scope 3 emissions for the following reasons. First, cl 2.20 was promulgated against the backdrop that "[t]here are accepted accounting and reporting standards for the greenhouse gas emissions of a development that require consideration of all three scopes of emissions, Scopes 1, 2 and 3 emissions".[56] Consistently with this, the IPC acknowledged at R[125] (**AFM 214**) that "GHG emissions are generally categorised into three different types".

56. Secondly, the text of cl 2.20 expressly distinguishes between different types of emissions since it identifies "downstream" emissions in particular in cl 2.20(2). Thirdly, the type of condition that the consent authority must consider is one that aims to ensure that GHG emissions are "minimised to the greatest extent practicable". Conditions could only meet this description if they were separately addressed to Scope 1, Scope 2 and Scope 3 emissions since conditions that minimise Scope 1 emissions to the greatest extent practicable will be of an entirely different order to those required to minimise Scope 3 emissions.[57] This is a function of the different ways the Project's emissions are generated.

57. ***The NSWCA's approach to the IPC's reasons*:** Ward P gave two reasons, at CA[81]-[83] (**CAB 150-151**) for concluding that the IPC had considered whether or not to impose minimisation conditions on the Scope 3 emissions. First, her Honour found at CA[81] that because the IPC found the emissions were "regulated" and accounted for elsewhere, that was a sufficient indication there was no need to impose conditions. Secondly, Ward P said it was "readily understandable" that the IPC did not refer to specific conditions for minimising Scope 3 emissions since no one suggested any, and DAMSHEG "cannot now complain" given "its apparent forensic choice" not to propose any minimisation

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54 *Mullaley* [2021] NSWLEC 110; (2021) 252 LGERA 221 at [97]-[101].

55 *Gloucester* [2019] NSWLEC 7; (2019) 234 LGERA 257 at [428], [486] and [492] (Preston CJ). *KEPCO* [2021] NSWCA 216; (2021) 250 LGERA 39 at [39]-[40] (Basten and Payne JJA) and [139]-[140] (Preston CJ of LEC).

56 *Mullaley* [2021] NSWLEC 110; (2021) 252 LGERA 221 at [100] (Preston CJ); *Gloucester* [2019] NSWLEC 7; (2019) 234 LGERA 257 at [489] (Preston CJ), referring to the accounting and reporting standards. See also *Gray* [2006] NSWLEC 720; (2006) 152 LGERA 258 at [19] and [30]-[31] (Pain J).

57 *Mullaley* at [104]-[107] (Preston CJ).

conditions. Adamson JA also said that DAMSHEG had made a "forensic choice" not to propose conditions (at CA[225], **CAB 193**). Further, the fact that the IPC addressed the international "controls" which applied to Scope 3 emissions persuaded her Honour that no inference could be drawn that it had not considered whether or not to impose minimisation conditions (at CA[229], **CAB 194**).

58. ***Errors in the NSWCA's approach:*** The fact that the IPC did not refer to having considered minimisation conditions for Scope 3 emissions (despite them being 98% of the Project's total emissions) was a significant factor pointing to the conclusion that the IPC did not consider whether or not to impose such conditions. It was an error for the NSWCA to dismiss that factor by attributing that omission to a "forensic choice" on the part of DAMSHEG. That overlooked that the statutory scheme placed responsibility upon the proponent to propose conditions, which was reinforced in this case by the SEARs requiring it to do so (see paragraphs 9 to 11), and responsibility upon the Department to assess the DA and EIS (see paragraph 16). Further, DAMSHEG drew to the IPC's attention that no Scope 3 minimisation conditions had been proposed: see paragraph 17 above.

59. Moreover, the IPC's finding that Scope 3 emissions were "regulated" and accounted for through broader policies and agreements did not address the question of whether they were minimised to the greatest extent practicable. Indeed, the fact that cl 2.20(2) expressly draws attention to downstream emissions is recognition that minimisation conditions can be imposed on consents notwithstanding Scope 3 emissions arise from the combustion of the coal product.[58]

60. Further, and in any event, both Ward P and Adamson JA disregarded the structure of the IPC's reasons. The reference in those reasons to regulating Scope 3 emissions overseas (in particular at R[150], R[153], **AFM 219**) was in a section of the reasons prior to the point at which the IPC commenced its consideration of cl 2.20 (from R[154], **CAB 219**).

61. While the mere failure of a decision-maker to refer to a matter in written reasons does not, in and of itself, prove that the matter was not considered by the decision-maker,[59] it

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[58] It may be noted that the failure to propose minimising conditions for Scope 3 emissions was a key reason why development consent was not granted by the IPC in *KEPCO*.

[59] *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWCA 215; (2023) 112 NSWLR at [62] (Payne JA).

10 is one factor to take into the mix. In this case, three other factors should have led the NSWCA to find the IPC failed to consider conditions regarding Scope 3 emissions.

62. First, the appellant did not propose any minimisation conditions for Scope 3 emissions in its EIS, and the Department did not recommend any in the DAR: see paragraphs 14 and 16 above. Indeed, as White JA observed in *Bingman Catchment Landcare Group Inc v Bowdens Silver Pty Ltd* [2024] NSWCA 205; (2024) 260 LGERA 297 at [41]-[42], it was "hardly surprising" that the IPC failed to consider a particular matter since the Department provided no advice to it about that matter.

63. Secondly, given the self-evident significance of the Scope 3 emissions as 98% of the Project's total emissions, it is reasonable to expect that had the IPC considered whether
20 or not to impose minimisation conditions on them, it would have expressly stated so.[60] This is particularly so in light of the requirements for transparency of decision-making in the legislative scheme.[61] Thirdly, the fact that the IPC addressed its consideration of minimisation conditions for Scope 1 and Scope 2 emissions (only 2% of the emissions) in some detail in its Reasons supports an inference that if it had considered conditions for Scope 3 emissions, it would had mentioned doing so in its Reasons.

## PART VII ESTIMATE

64. The first respondent estimates that it will require up to 2.25 hours to present its arguments (including in respect of its Notice of Contention).

Dated: 5 March 2026



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30 The first respondent is represented by Johnson Legal.

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60 *Cf Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 275 CLR 582 at [25] (Kiefel CJ, Keane, Gordon and Steward JJ); *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 322 at [5] (Gleeson CJ); [69] (McHugh, Gummow and Hayne JJ).

61 As to which, see the arguments recorded by Ward P at CA[49] (**CAB 141**).

10 **ANNEXURE TO FIRST RESPONDENT'S SUBMISSIONS**

| No | Description | Version | Provision | Reason for providing this version | Applicable date(s) |
|---|---|---|---|---|---|
| ***Principal legislation*** | | | | | |
| 1. | *Environmental Planning and Assessment Act 1979* (NSW) | 29 Jul 2022 to 27 Nov 2022 | ss 1.3, 1.4, 2.9, 2.21, 2.23, 2.23, Pt 4<br>Sch 1: cll 9, 11, 14, 20<br>Sch 2: cl 3 | Version in force at time of IPC's decision | 6 Sep 2022 |
| 2. | *Environmental Planning and Assessment Act 1979* (NSW) | 1 Jan 2018 to 28 Feb 2018 | s 79C | Last version when s 79C was in force | N/A |
| 3. | *Environmental Planning and Assessment Act 1979* (NSW) | 30 Jun 1998 | s 90 | Last version when s 90 was in force | N/A |
| 4. | *Environmental Planning and Assessment Act 1979* (NSW) | As enacted | s 84;<br>Sch 3 | For illustrative purposes | N/A |
| 5. | *Protection of the Environment Administration Act 1991 (NSW)* | 1 Sept 2022 to 16 Feb 2023 | s 6 | For illustrative purposes | N/A |
| ***Legislation amending the principal legislation*** | | | | | |
| 6. | *Environmental Planning and Assessment Amendment Act 1997* (NSW) | As enacted | Sch 1, item 32 | For illustrative purposes – s 90 replaced with s 79C | N/A |
| 7. | *Environmental Planning and Assessment Amendment Act 2017* (NSW) | As enacted | Sch 4, Pt 4.2, Item 1 | For illustrative purposes - s 79C renumbered as s 4.15 | N/A |
| ***Subordinate legislation and instruments*** | | | | | |
| 8. | *Environmental Planning and Assessment Regulation 2000* (NSW) | 22 Jan 2021 to 31 Jan 2021 | regs 77, 78<br>Sch 2 – cll 3, 6, 7 | Version in force at time appellant lodged its EIS | 22 Jan 2021 |

| No | Description | Version | Provision | Reason for providing this version | Applicable date(s) |
|---|---|---|---|---|---|
| | | | Sch 3 – Pt 1 | | |
| 9. | *State Environmental Planning Policy (Resources and Energy) 2021* (NSW) | 2 Mar 2022 to 27 Oct 2022 | cl 2.20 | Version in force at time of IPC's decision | 6 Sep 2022 |
| 10. | *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) | 17 Sep 2021 to 25 Nov 2021 | cl 14 | For illustrative purposes | N/A |
| ***Other legislation*** | | | | | |
| 11. | *Climate Change (Net Zero Future) Act 2023 (NSW)* | | ss 3, 4, 5, 7, 8 | For illustrative purposes | |
| 12. | *Environment Protection and Biodiversity Conservation Act 1999* (Cth) | 3 May 2002 to 22 Sep 2002 | s 75 | For illustrative purposes – provision considered in *Queensland Conservation Council* (2004) 139 FCR 24 | 16 Sep 2002 |

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