HIGH COURT OF AUSTRALIA

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Form 27C—Intervener's submissions

Note: See rule 44.04.4.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

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

SUBMISSIONS OF MELBOURNE CLIMATE FUTURES SEEKING LEAVE TO BE HEARD AS *AMICUS CURIAE*

Part I Certification

1. This submission is in a form suitable for publication on the internet.

Part II Basis of application for leave to be heard

2. Melbourne Climate Futures (**MCF**) seeks leave to be heard as *amicus curiae* in relation to the proper construction of s 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and the consequences of that construction for Grounds 1 to 3.

Part III Why leave to be heard as amicus curiae should be granted

3. MCF is a University of Melbourne initiative dedicated to the advancement of multi-disciplinary climate change research. MCF's key areas of research

include climate law, policy and governance, including international, foreign and domestic climate litigation.[1]

4. MCF's submissions are informed by the expertise of Redmond Barry Distinguished Professor Jacqueline Peel, who has published extensively in the fields of international and Australian environmental and climate law and litigation, and is a Coordinating Lead Author for the United Nations' Intergovernmental Panel on Climate Change (**IPCC**).[2] As the 2024 Kathleen Fitzpatrick Australian Laureate Research Fellow, Professor Peel currently leads a five year research program focused on the climate accountability of government and corporate actors, which includes research into climate litigation.[3] MCF's submissions are also informed by legal academics with relevant expertise in foreign and international environmental and climate law.[4]

5. Leave to be heard should be granted because MCF can offer the Court "the benefit of a larger view of the matter before it than the parties are able or willing to offer".[5] If leave is granted, MCF will make submissions:

   (a) that advance a positive construction of s 4.15(1)(b) of the EPA Act, and in doing so illustrate that the area of dispute between the parties in relation to Ground 1 is not as large as it might seem;

   (b) in support of Ground 2 being dismissed, for reasons that are premised on MCF's positive construction and therefore differ from the submissions advanced by the first respondent; and

   (c) in support of Ground 3 being dismissed (should it properly arise), for reasons that cohere with, but differ in certain respects from, the submissions advanced by the first respondent. In particular, MCF can assist the Court with the correct approach to the causal inquiry required

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1 Affidavit of Jacqueline Peel affirmed 19 March 2026 at [3], [5].

2 Affidavit of Jacqueline Peel affirmed 19 March 2026 at [11], [14], Ex JP-2.

3 Affidavit of Jacqueline Peel affirmed 19 March 2026 at [10].

4 Affidavit of Jacqueline Peel affirmed 19 March 2026 at [16].

5 *Wurridjal v The Commonwealth* [2009] HCA 2; 237 CLR 309 at 312 (French CJ).

by s 4.15(1)(b) of the EPA Act and the extent to which the foreign and international cases cited by the parties can properly inform that inquiry.

6. MCF does not raise additional grounds or errors. Its submissions crystallise and narrow the issues in dispute by clarifying the constructional controversy between the parties and the relevant climate law cases of assistance. A grant of leave would not add materially to the parties' preparation for the hearing or its length.[6]

Part IV Argument

IV-1 Overview of argument

7. Section 4.15(1)(b) of the EPA Act requires a consent authority to take into consideration the "likely impacts" of a development that "are of relevance".[7] The *first* step required by s 4.15(1)(b) is for the consent authority to identify what the "likely impacts" of the development are, by assessing what impacts are caused by or flow from the development. The *second* step is for the consent authority to consider those impacts.

8. The words "including environmental impacts on both the natural and built environments, and social and economic impacts in the locality" provide two non-exhaustive illustrations of the kinds of likely impacts that fall within sub-paragraph (b), not constraints on the mandatory consideration itself. The "likely impacts", including the "environmental impacts", are without geographical or spatial limitation, meaning that a decision-maker is required to identify and consider *both* local and non-local impacts of the development, including environmental impacts, to the extent they "are of relevance" to the development: **Section IV-2**.

9. For this reason, the question whether or not the words "in the locality" attach to the concept of "environmental impacts" is beside the point (if that is the

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6 *Roadshow Films Pty Ltd v iiNet Limited (No. 1)* [2011] HCA 54; 248 CLR 37 at [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) affirming *Levy v Victoria* [1997] HCA 31; 189 CLR 579 at 604-5 (Brennan CJ).

7 According to the version of s 4.15 that applied at the time of the IPC's decision on 6 September 2022. Section 4.15(1)(b) was subsequently amended to refer to "significant likely impacts".

construction the NSW Court of Appeal (**NSWCA**) adopted, as to which MCF makes no submission). Even assuming the words "in the locality" attach only to "social and economic impacts", the appellant accepts that the "likely impacts" and "environmental impacts" are without geographic or spatial limitation: **AS[31], [35], [40]**. The appellant does not go so far as to suggest that environmental impacts in the locality are *prohibited* considerations under s 4.15(1)(b). It must therefore accept that a decision-maker is required to consider both local and non-local environmental likely impacts of the development to the extent relevant. The first respondent submits that the decision-maker is required to consider the likely impacts on the environment "at least" in the vicinity of the development (**1R[26]**), while presumably accepting that the decision-maker is also required to consider non-local impacts of the development to the extent relevant. The differences in the parties' constructions are minimal.

10. Therefore, the real dispute turns on the meaning of the words "likely impacts of [the] development" and whether in this case they were limited to the impacts of greenhouse gas (**GHG**) emissions on the climate system, as a component of the natural environment, or whether they also included impacts on other components of the natural environment via extreme weather events, bushfires and heavy rainfall events.

11. As to the grounds advanced by the appellant:

    (a) Ground 1. Irrespective of whether the words "in the locality" attach to "environmental impacts" or only to "social and economic impacts", on the proper construction of s 4.15(1)(b), the Independent Planning Commission (**IPC**) was required to consider both local and non-local environmental impacts of the development to the extent they were relevant. MCF makes no submission as to which construction the NSWCA in fact adopted: **Section IV-3**.

    (b) Ground 2. Section 4.15(1)(b) does require a causal inquiry: as a first step, it requires the consent authority to determine what the "likely impacts" of the development are – i.e. whether particular effects flow from the development – before those effects become mandatory

considerations. Here, s 4.15(1)(b) required the IPC to determine whether the "likely impacts" included not only the impacts of GHG emissions on the climate system, but also further impacts of the altered climate system on other components of the natural environment in the vicinity of the development. The NSWCA's conclusion that the IPC was required to engage in that causal inquiry is correct and Ground 2 should be dismissed: **Section IV-4**.

(c) Ground 3. Even assuming it is appropriate and permissible for the appellant to dispute the causal connection between the Project and local climate change impacts in this Court, the appellant's propositions as to causal impossibility are not borne out by the relevant and analogical foreign and international case law and are inconsistent with current climate attribution science: **Section IV-5**.

IV-2 The proper construction of s 4.15(1)(b)

12. Section 4.15(1) of the EPA Act lists matters which, if "of relevance" to a particular development the subject of a development application, are mandatory considerations for a consent authority in determining that application under s 4.16 (or, as here, a State significant development application under s 4.38).

13. Section 4.15(1)(b) concerns the "likely impacts" of such a development, including its "environmental impacts". MCF submits those impacts can extend to local and non-local impacts. On its proper construction,[8] "likely impacts" can include:

(a) the impacts of GHG emissions on the climate system contributing to climate change (the climate system being a component of the "natural environment"); and

(b) impacts on *other* parts of the "natural and built environments", including as a consequence of climate change and its effects.

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8 *Palmanova Pty Ltd v Commonwealth* [2025] HCA 35; 99 ALJR 1362 at [4] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ).

14. The following four features of the statutory text, read in light of the provision's context and purpose, explain the above construction.

(i) Considerations that "are of relevance to the development"

15. Section 4.15(1) provides that a consent authority "is to take into consideration such of the following matters as are of relevance to the development". The listed considerations are mandatory only to the extent they are "of relevance".

16. Thus, the first step for the consent authority under s 4.15(1) is to identify which of the listed considerations are relevant to the particular development application before it.[9] Whether they are "relevant" in a particular case is a matter of opinion for the consent authority,[10] about which "it had to inform itself sufficiently".[11] For the purposes of s 4.15(1)(b), this requires the consent authority to identify the "likely impacts of [the] development", by finding facts and drawing inferences from the available information to "ascertain[] the nature and extent of each type of impact".[12]

17. The second step is to "take into consideration" those impacts, along with the other matters in s 4.15(1) to the extent relevant, in determining the application. The consent authority engages in an evaluative exercise in exercising the discretion to grant or refuse the application and determine any conditions of the

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9 *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205; 144 LGERA 119 at [42] (Basten JA, Giles and Santow JJA agreeing). See also ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; 280 CLR 321 at [33] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

10 See, in another legislative context, *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 116; 298 FCR 516 at [95] (the Court).

11 ***Weal*** *v Bathurst City Council* [2000] NSWCA 88; 11 LGERA 181 at [80] (Giles JA, Priestley JA agreeing, Mason P dissenting in the result); ***Bushfire Survivors for Climate Action*** *Incorporated v Narrabri Coal Operations Pty Ltd* [2023] NSWLEC 69 at [47(2)] (Duggan J).

12 ***Bulga Milbrodale Progress Association*** *Inc v Minister for Planning and Infrastructure and Warkworth Mining* [2013] NSWLEC 48; 194 LGERA 347 at [38], see also [36]-[37] (Preston CJ) (appeal dismissed in *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; 86 NSWLR 527); *Bushfire Survivors for Climate Action* at [47(3)] (Duggan J).

grant.[13] The weight to be afforded to a likely impact is a matter for the consent authority, after having given it due consideration.[14]

(ii) "Likely impacts of [the] development"

18. Three propositions concerning the phrase "likely impacts of that development" are relevant. *First*, "likely" means "a real chance or possibility" rather than "more likely than not".[15] *Second*, "impacts" includes not only the direct impacts of the development, but impacts "flowing from the development" forming part of a "chain of likely consequences".[16] *Third*, once the consent authority identifies an impact as a likely impact, it must consider it. The causal inquiry called for by s 4.15(1)(b) is a risk-based one, informed by the object of the EPA Act to facilitate ecologically sustainable development,[17] including by reference to the precautionary principle.[18] It is not governed by the principles of causation in the law of negligence.

(iii) The word "including", and the non-exhaustive illustrative examples

19. The words following "likely impacts of that development" in s 4.15(1)(b) — "including environmental impacts on both the natural and built environments, and social and economic impacts in the locality" — are non-exhaustive

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13 *Weal* at [80] (Giles JA, Priestley JA agreeing, Mason P dissenting in the result). See *LPDT* at [33] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ); ***Bingman*** *Catchment Landcare Group Inc v Bowdens Silver Pty Ltd* [2024] NSWCA 205 at [99] (White JA, Adamson JA agreeing), referring to *Ross v Lane* [2022] NSWCA 235; 255 LGERA 136 at [94]-[100] (Basten AJA, with whom Macfarlan JA agreed).

14 *Bulga Milbrodale Progress Association* at [39]-[40] (Preston CJ); see *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59; 180 LGERA 99 at [44] (the Court); *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 275 CLR 582 at [24], see also [25]-[27] (Kiefel CJ, Keane, Gordon and Steward JJ).

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

16 *Hoxton Park* at [44] and [46] (Basten JA, Giles and Macfarlan JJA agreeing).

17 EPA Act ss 1.3(b), 1.4 (definition of "ecologically sustainable development"); *Protection of the Environment Administration Act 1991* (NSW) (**POEA Act**) s 6(2)(a) ("ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes.")

18 The precautionary principle operates such that "if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation": POEA Act s 6(2)(a).

illustrations. They do not constrain the meaning of "likely impacts of that development". The word "including" makes plain that what follows are examples only of the kinds of likely impacts that the consent authority must consider. The comma before "including" separates the identified mandatory consideration from the illustrative examples. The subsequent comma between the two illustrations merely demarcates two different non-exhaustive examples.

20. The appellant submits that the comma after "environments" confines the phrase "in the locality" to the "social and economic impacts" illustration alone, thereby excluding the first illustration from any spatial or geographic limitation: **AS[35]-[37]**. That submission is somewhat of a distraction. Because both phrases are non-exhaustive illustrations, neither expands nor contracts the meaning of "likely impacts". The phrase "in the locality", irrespective of whether it attaches to "environmental impacts" or only "social and economic impacts", does not limit the mandatory consideration of "likely impacts" to local impacts, nor does it exclude from mandatory consideration impacts occurring outside the locality: it simply articulates one species of likely impact.

21. Even if "in the locality" attaches only to "social and economic impacts", as the appellant contends, the fact remains that the phrase "likely impacts" is not limited geographically or spatially, and nor is "environmental impacts": **AS [31], [35], [40]**. Thus, the decision-maker must consider *both* local and non-local environmental impacts to the extent that they "are of relevance" to the development. As noted at [9] above, when the parties' submissions are distilled, it appears that neither of them disagrees with this fundamental proposition. Rather, what they dispute is whether the local impacts on the environment here (such as more extreme weather events, bushfires and heavy rainfall events) were "impacts" and/or impacts "of that development" – issues sought to be raised under Grounds 2 and 3.

22. A construction that treats the words of high generality in s 4.15(1)(b) as inclusive, embracing among other things both local and non-local impacts, is consistent with the objects of the EPA Act. The Act requires the prior assessment of a development application so that *all* relevant likely impacts of the development can be assessed before a decision is made whether to allow the

development. That is essential because, once the impacts occur — some of which may be irreversible — it is too late to determine that they were in fact not justified by the benefits of the development which have in fact accrued.[19] The legislative scheme in which ss 4.15, 4.16 and 4.38 are housed is in part directed towards ensuring that, when future generations look back, they can see that the environmental harm that the activity in fact caused was anticipated and was seen to be justified by the economic and social benefits that were estimated to accrue on the best possible material available. That is precisely the work that "inter-generational equity"[20] is doing, in combination with the "precautionary principle", in facilitating the achievement of ecologically sustainable development by the measures employed in the Act.[21]

(iv) Likely impacts on the natural environment

23. "Environment" is defined in the EPA Act to include "all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings".[22] That is consistent with the ordinary meaning of "environment", which this Court has held to signify "that which surrounds", and observed that "[w]hat constitutes the relevant environment must be ascertained by reference to the person, object or group surrounded or affected".[23]

24. A definition is not itself a substantive enactment to be construed, but must be imported into the terms of s 4.15(1)(b) before that provision can be properly construed.[24] Following that approach, importing the words of the definition into the relevant operative words "natural and built environments" in s 4.15(1)(b) produces a clear meaning: likely impacts include impacts on the natural world

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19 The precautionary principle seeks to avoid that scenario by guiding decision-makers to not postpone measures that prevent environmental degradation due to lack of scientific certainty if there are threats of serious or irreversible environmental damage: see paragraph 18 above.

20 POEA Act s 6(2)(b) ("inter-generational equity" is the principle that "the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations".)

21 EPA Act ss 1.3(b), 1.4 (definition of "ecologically sustainable development"); POEA Act s 6(2)(a)-(b).

22 EPA Act s 1.4.

23 *The Crown v Murphy* [1990] HCA 42; 64 ALJR 593 at 596 (the Court).

24 *Kelly v The Queen* [2004] HCA 12; 218 CLR 216 at [84], [103] (McHugh J).

surroundings of humans (the "natural" environments) and on human-made surroundings (the "built" environments).

25. That meaning admits of the likely impacts of a development's GHG emissions on the natural environment, in all its relevant aspects, including direct impacts on the climate system, as well as further impacts of the altered climate system on other components of the natural environment.

(A) On the climate system

26. The climate system is a component of the natural environment. This is a basic and notorious fact about the natural world, properly treated as a "legislative fact"[25] informing the scope and content of the mandatory consideration. It is confirmed by multiple public, authoritative sources.[26] Perhaps most authoritative is the use of the phrase "climate system" by the IPCC,[27] specifically in its Summaries for Policymakers, which are adopted by consensus after a governmental approval process that entails detailed line-by-line discussion and agreement amongst scientific experts and the 194 "Member Countries" of the IPCC (including Australia).[28] The International Court of Justice (**ICJ**) unanimously explained, in its recent *Advisory Opinion on the*

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25 See *Re Day* [2017] HCA 2; 91 ALJR 262 at [20]-[24] (Gordon J); *Autugrul v The Queen* [2012] HCA 15; 247 CLR 170 at [71], [74] (Heydon J). On legislative facts more generally, see ***Maloney*** *v The Queen* [2013] HCA 28; 252 CLR 168 at [351]-[353] (Gageler J); Stephen Gageler, "Seventeenth Sir Ninian Stephen Lecture 2009 - Fact and Law" (2009) 11 *The Newcastle Law Review* 1; Michelle Gordon AC, *Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law* (2023) 49(1) *Monash University Law Review* 1, 6.

26 See *Maloney* at [353] (Gageler J); *Gerhardy v Brown* [1985] HCA 11; 159 CLR 70 at 142 (Brennan J).

27 See IPCC, *AR6 Synthesis Report: Climate Change 2023*, Annex I: Glossary, which defines "climate system" as "[t]he global system consisting of five major components: the atmosphere, the hydrosphere, the cryosphere, the lithosphere and the biosphere and the interactions between them": p 122. The *United Nations Framework Convention on Climate Change* (**UNFCCC**) defines the "climate system" in equivalent terms: UNFCCC, opened for signature 3 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 1(3). Australia signed the UNFCCC in June 1992 and ratified it on 30 December 1992.

28 IPCC, *Appendix A to the Principles Governing IPCC Work: Procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC Reports* (adopted 15th sess, San José, 15-18 April 1999; amended 37th sess, Batumi, 14-18 October 2013), sections 2, 4.4. See ICJ Advisory Opinion at [60] (the Court).

obligations of States in respect of Climate Change (**ICJ Advisory Opinion**),[29] that the "climate system … is an integral and vitally important part of the environment".[30] Other courts have proceeded on this understanding.[31]

27. The GHG emissions of a development necessarily interfere with the climate system, as a component of the natural environment within the meaning of s 4.15(1)(b). That impact is not merely "likely" — it is inevitable.[32]

(B) On other parts of the environment

28. The scope of s 4.15(1)(b) also extends to impacts on other parts of the natural environment and the built environment. The consequences of climate change that affect other components of the natural environment and the built environment are also capable of being likely impacts of a development within the scope of the mandatory consideration, to the extent they are linked to the development's GHG emissions as part of the chain of consequences flowing from the development.

29. That is supported by the objects of the EPA Act, especially to facilitate "ecologically sustainable development" (**ESD**) and to "protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats".[33] The definition of ESD in the EPA Act refers to s 6(2) of the POEA Act, which in turn picks up the statutory definition of "environment" in that Act, which includes land, air and water; any layer of the atmosphere; organic and inorganic matter; any living organism; and human made structures. That confirms what was clear from the

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29 This Court has placed reliance on the ICJ's decisions in the past, both in relation to statutory interpretation and in the development of the common law: *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at [40]-[41] (Brennan J), [181] (Toohey J, describing the approach taken by the ICJ as being "more in accord with reality"); *Kingdom of Spain v Infrastructure Services Luxembourg sàrl* [2023] HCA 11; 275 CLR 292 at [20] (the Court); *Federal Commissioner of Taxation v Jayasinghe* [2017] HCA 26; 260 CLR 400 at [67] (Gageler J).

30 ICJ Advisory Opinion at [273] (the Court).

31 See e.g. ***Gloucester Resources*** *Ltd v Minister for Planning* [2019] NSWLEC 7; 234 LGERA 257 at [431], [435], [438]-[439], [442], [445], [450], [515], [525], [532], [556] (Preston CJ).

32 *R (**Finch**) v Surrey County Council* [2024] UKSC 20 at [2], [7], [79] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

33 EPA Act s 1.3(a), (b).

definition of "environment" in the EPA Act: it is broad enough to encompass the climate system as well as other components of the natural and built environments.

30. Accordingly, likely impacts on other components of the environment are also capable of being mandatory considerations, including where those likely impacts can be characterised as climate change impacts, the frequency or intensity of which will become more pronounced due to the GHG emissions contributed by the development under consideration.

31. Having set out its construction of s 4.15(1)(b), MCF makes the following further submissions in relation to each Ground below.

IV-3 Ground 1

32. Once the proper construction of s 4.15(1)(b) is understood (as set out above), the point of construction raised by the appellant on Ground 1 becomes less significant. Even assuming the NSWCA did construe the words "in the locality" as attaching to "environmental impacts" (as to which, MCF makes no submission), if the appellant is right in contending that those words only attach to "social and economic impacts" that only takes the appellant so far. The appellant nevertheless accepts that the "likely impacts" and "environmental impacts" referred to in s 4.15(1)(b) are without geographic or spatial limitation: **AS[31], [35], [40]**. The necessary consequence of accepting this is that s 4.15(1)(b) requires consideration of both local and non-local likely environmental impacts of the development to the extent relevant. The first respondent accepts this too: **1R[26].** The real question then becomes whether the asserted impacts of climate change were "likely impacts of that development", which is raised by the appellant under Grounds 2 and 3.

IV-4 Ground 2

33. Properly construed, the terms of s 4.15(1)(b) do in fact require a causative enquiry to be undertaken: cf. **AS[47]**. What s 4.15(1)(b) requires, as part of the first step of identifying the "likely impacts" of a development, is an assessment of the causal relationship between a development and its impacts: **CA[109]**; **CAB158**. In this case, due to the evidence before the IPC regarding climate

change impacts, including that the locality of the Project was particularly susceptible to such impacts, the IPC was required to engage in the relevant causative enquiry: **CA[236]-[238]**; **CAB196-197**. MCF adopts the submissions of the first respondent on this ground and adds the following.

34. The cases relied on by the appellant at **AS[48]** are not apt. The relevant statutory schemes in those cases did not require a decision-maker to determine for itself which of a list of statutory criteria were "relevant" to the particular application under consideration. The structure of s 4.15(1) is materially different. The chapeau expressly directs the consent authority to take into consideration only such of the listed matters "as are of relevance to the development". That statutory direction requires the consent authority to go beyond the text of the Act and into the facts — to form a view, on the material before it, as to which of the enumerated considerations are relevantly engaged and to what extent. The statement in *Abebe* that "the identification of relevant and irrelevant considerations is to be drawn from the statute ... rather than from the particular facts"[34] cannot apply with full force where, as here, the statute itself directs the decision-maker to assess relevance by reference to the facts.

35. The appellant's formulation of Ground 2 is itself too broad. If s 4.15(1)(b) imposes no obligation to conduct a causal inquiry as to climate change impacts, then a consent authority assessing a coal mine could lawfully decline to identify and consider even the impacts of climate change associated with the direct emissions from the mine itself (i.e., "Scope 1" emissions). That cannot be correct.

IV-5 Ground 3

36. The appellant contends that the NSWCA erred in holding that the impacts of climate change in the locality of the Project were capable of being considered an environmental impact "of [the] development" within the meaning of s 4.15(1)(b): **AS[62], [65]**. It attempts to substantiate that contention by submitting the Project's Scope 3 emissions cannot "contribute in a detectable or meaningful way to a particular local impact of climate change": **AS[59]-[64]**.

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34 *Abebe v Commonwealth* [1999] HCA 14; 197 CLR 510 at [195] (Gummow and Hayne JJ).

37. Ground 3 ought to be dismissed for two reasons.

38. The *first* is that Ground 3 is misconceived. It proceeds on the basis that the NSWCA made a finding that the relevant climate change impacts were properly characterised as impacts of the development. However, as explained above, s 4.15(1)(b) requires at least two steps: the decision-maker must identify the "likely impacts of [the] development" and then it must consider those impacts against all the other matters in s 4.15(1)(b). The IPC failed to undertake even the first step insofar as it failed to assess whether the impacts of climate change in the locality were "likely impacts of [the] development". In particular, it failed to assess the extent of the causal connection between the development and those impacts. That was enough to establish error on the IPC's part. In those circumstances, the NSWCA did not, and did not need to, decide that there is a sufficient causal link between the Project's GHG emissions and local climate change impacts. To the extent that the appellant is instead making a materiality argument – namely, that any failure by the IPC to undertake its task was immaterial because it would have been unable to conclude that the relevant impacts were caused by the development – the Court will need to consider whether the appellant is permitted to do so in circumstances where such an argument is made for the first time and may have been met by evidence below.

39. The *second* is that, in any case, the appellant's propositions as to causal impossibility are not borne out by the relevant and analogical foreign and international cases,[35] and are inconsistent with current climate attribution science.

40. The decision of a foreign court that is of the most assistance is that of the UK Supreme Court in *Finch*. The majority judgment of Lord Leggatt (Lord Kitchin and Lady Rose agreeing) provides a helpful framework for analysing causation issues in the context of environment and planning legislation such as the EPA Act. The relevant regulation in that case required that an environmental impact assessment (**EIA**) "identify, describe and assess in an appropriate manner… the direct and indirect significant effects" of the project on, amongst other matters,

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[35] See ***Momcilovic*** *v The Queen* [2011] HCA 34; 245 CLR 1 at [18] (French CJ).

"climate".[36] The Council accepted an EIA for an onshore oil project despite the EIA including information only about the direct releases of GHGs at the project (i.e., Scope 1 emissions) and not the project's combustion emissions (i.e., Scope 3 emissions).[37] The issue was whether the "significant effects of the project on climate" included the combustion emissions, such that the Council was obliged to assess them as part of the EIA.[38]

41. *Finch* therefore concerned an antecedent step in the causal chain: whether the project's significant effects on climate included its Scope 3 emissions. The majority considered it was "known with certainty" that the extraction of oil would initiate a causal chain that would lead to the combustion of the oil and the release of GHGs into the atmosphere. The project's effects on climate were therefore "not merely likely but inevitable".[39] That step in the causal chain is not in issue in this case, which concerns whether the IPC had an obligation to identify and consider the impacts of climate change on other components of the environment. Three aspects of the majority's reasoning are nonetheless pertinent. *First*, what are or are not "effects of a project" is a question of causation. "An effect is the obverse of a cause".[40] The same can be said of "impacts" in the context of s 4.15(1) of the EPA Act. *Second*, whether one event or state of affairs (Y) is an effect of another event or state of affairs (X) – or, conversely, whether X is a cause of Y – is in the first place a question of fact. That question is resolved through the application of scientific knowledge, which knowledge may increase and develop as new research is undertaken and new discoveries are made.[41] *Third*, establishing that, as a matter of fact, there is a causal relationship between events X and Y, does not by itself answer the question whether, as a matter of law, X is to be regarded as a cause of Y (and Y

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36 *Finch* at [53] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

37 *Finch* at [5], [43] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

38 *Finch* at [52]-[53] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

39 *Finch* at [79], see also [2] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing). The combustion emissions were therefore both "necessary and sufficient" to bring about effects on the climate system, which is the strongest possible form of causal connection – much stronger than is required as a test of causation for most legal purposes: [79]-[80] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

40 *Finch* at [65] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

41 *Finch* at [66] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

as an effect of X). The resolution of that question depends on the legal context in which it arises. Different legal contexts give rise to different tests of causation.[42] Critically, the questions of causation that arise in the context of environmental and planning approvals differ from other areas of law because the inquiry is forward-looking. The question is not determining whether one past event caused another past event, as often arises in tort.[43]

42. The preceding analysis elucidates that much of the foreign and international jurisprudence cited in the parties' submissions is of limited assistance in resolving causation issues in this case: see **AS[63]-[64]; 1R[42] (fn 33), [48]-[49]**. That is for at least two reasons.

43. *First*, while the impacts of a development's GHG emissions on the climate system are inevitable, other causal questions of fact arising in a specific case must be resolved by reference to the evidence and information made available to the decision-maker.[44] It is therefore unsurprising that courts around the world have reached varying conclusions as to whether there is a causal link between a particular source of GHG emissions and a particular impact of climate change: see **AS[64]; 1R[48]-[49]**. As explained above, the question of whether there was, as a matter of fact, a causal link between the Project's GHG emissions and local climate change impacts was an evaluative matter for the IPC based upon the information before it. Factual findings in other cases cannot assist the Court in resolving the issues raised by Ground 3.

44. In any event, to the extent **AS[64]** suggests that courts have found such linkages "impossibl[e]", that is incorrect.[45] In the case cited in support of that proposition (**AS fn 53**), the Higher Regional Court of Hamm "affirmed" the "materiality of the defendant's contribution to causation [of harm]".[46] It considered the defendant "directly causes the imminent impairment of the plaintiff's property through its own action, even if this initiates a stretched causal process and

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42 *Finch* at [67]-[71] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

43 *Finch* at [72] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

44 See *Finch* at [74] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

45 ICJ Advisory Opinion at [438] (the Court).

46 *Lliuya v RWE AG*, Case No 1-5 U 15/17 (28 May 2025) p 47.

ultimately leads to a natural event".[47] The plaintiff was unsuccessful for a different reason, namely, the Court was not satisfied he had established an "imminent impairment" of his property, which was an element of establishing harm under § 1004(1) of the German Civil Code.[48]

45. The proposition that "attribution science is not generally (or presently) understood to permit such linkages" is also incorrect: **AS[63]**. Attribution science now permits the attribution of specific climate change impacts to a particular company's historic GHG emissions[49] or a particular fossil fuel project.[50] It is such developments in scientific knowledge that the majority in *Finch* contemplated may inform causal questions of fact.[51] Prior factual findings as to impact and source attribution in the context of climate change must therefore be approached with particular caution where there have been significant advances in climate attribution science since those findings were made.

46. *Second*, the causation issues in the foreign jurisprudence referred to at **AS[63]-[64]** arose in markedly different legal contexts and should be approached with some caution and care.[52] The case quoted at **AS[64]** concerned a motion to dismiss a foreign tort claim for want of jurisdiction. The quoted observations were made in circumstances where the plaintiffs had not alleged that the "seed" of their injury could be traced to any of the defendants. It was in that context that the Court noted that "the sources of the greenhouse gases are undifferentiated and cannot be traced back to any particular source, let alone the defendant".[53] Thus, it was the state of the pleadings that meant there was "no realistic possibility" of tracing climate change impacts to any particular person. Further, the case involved a backward-looking inquiry directed to the extent to

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47 *Lliuya v RWE AG*, Case No 1-5 U 15/17 (28 May 2025) p 49.

48 *Lliuya v RWE AG*, Case No 1-5 U 15/17 (28 May 2025) pp 81-85.

49 Christopher W Callahan and Justin S Mankin, 'Carbon majors and the scientific case for climate liability' (2025) 640(8060) *Nature* 893.

50 Nerilie J Abrams et al., 'Quantifying the regional to global climate impacts of individual fossil fuel projects to inform decision-making' (2025) 4 *npj Climate Action* 92.

51 *Finch* at [66] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

52 *Momcilovic* at [19] (French CJ).

53 *Native Village of Kivalina v ExxonMobil Corp*, 663 F Supp 2d 863 (ND Cal 2009) at 880.

which a past event (the defendant's GHG emissions) contributed to another past event (the loss of Arctic sea ice as a result of climate change). In contrast, this case involves a forward-looking inquiry as to the potential impacts of a single, quantified source of GHG emissions.

47. The causation issues that arise in rights-based decisions such as that in *Verein KlimaSeniorinnen Schweiz v Switzerland* are also of limited relevance: see **AS[63]** and **1R fn 33**. In that case, the European Court of Human Rights identified four issues of causation that arise "[i]n the context of human rights-based complaints against States".[54] In any event, contrary to the impression conveyed by **AS[63]**, the Court did not consider that the unique characteristics of climate change precluded the ability to attribute particular environmental impacts to any given source of GHG emissions. It instead considered that those unique characteristics required it to develop a "more appropriate and tailored approach" as to the "various Convention issues which may arise in the context of climate change".[55]

48. Finally, MCF seeks to assist the Court by clarifying the appellant's treatment of "Scope 3" emissions. GHG emissions "scopes" are an accounting concept.[56] The cumulative impact of GHG emissions is the same, regardless of how they are categorised or where they occur.[57] The implications for this case are twofold. *First*, the categorisation of GHG emissions as "Scope 3" is irrelevant in assessing whether those emissions are "likely" impacts of a development for the purposes of s 4.15(1)(b). *Second*, that categorisation is also irrelevant in determining whether there is a causal link between the Project's contribution to

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54 *Verein KlimaSeniorinnen Schweiz v Switzerland* (European Court of Human Rights, Grand Chamber, Application No. 536000/20, 9 April 2024) at [424]-[425]. The only issue comparable to the issues in this case is the first, namely, the link between GHG emissions and the various phenomena of climate change. The Court considered that is a matter of scientific knowledge and assessment to be determined on the evidence in any given case: [425], [427]-[430]. The other three issues were all unique to human rights complaints against States: [431]-[444].

55 *Verein KlimaSeniorinnen Schweiz v Switzerland* (European Court of Human Rights, Grand Chamber, Application No. 536000/20, 9 April 2024) at [422].

56 Which concept derives from the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard and was incorporated into the Commonwealth Department of Industry, Science, Energy and Resource's National Greenhouse Accounts Factors used by the appellant in its EIS: **RFM 21-22**. See also *Finch* at [39]-[41] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

57 **IPC[152]; AFM 219**.

climate change and the particular impacts of climate change in the locality of the Project: cf. **AS[59], [61]-[62]**.[58]

49. The appellant also cites at **AS[17]** the IPC's statement that Scope 3 emissions were "appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement)" (**IPC[150]**; **AFM 219**). That statement is inaccurate as a matter of international law. There is no reference to emissions "scopes" in the UNFCCC, the Paris Agreement, or any other international law at the treaty or customary level. To the extent the Project's coal is combusted outside of Australia's national territory and offshore areas, State practice is such that Australia does not report the resulting GHG emissions under Art 13(7)(a) of the Paris Agreement.[59] Beyond that accounting context, international legal responsibility for the Project's combustion emissions is not limited solely to the country (or countries) in which they are emitted. The ICJ has clarified that the conduct covered by States' treaty obligations and the customary duty to prevent significant harm to the climate system is not limited to direct emissions. It comprises "all actions or omissions of States which result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions… including both consumption *and production* activities".[60] The ICJ identified fossil fuel production and the granting of fossil fuel exploration licences as conduct that may breach States' international law obligations and constitute an internationally wrongful act.[61] The customary duty also requires States to conduct EIAs that assess "possible specific climate-related effects" of "particularly significant proposed individual activities contributing to GHG

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58 See, relatedly, *Finch* at [93], [97] (Lord Leggatt, Lord Kitchin and Lady Rose agreeing).

59 IPCC, *2006 Guidelines for National Greenhouse Gas Inventories*, Volume 1, Chapter 1, 1.4, being one of the methodologies accepted by the IPCC and agreed upon by the Conference of the Parties pursuant to Decision 15/CP.17 and Decision 24/CP.19 for the purposes of art 13(7)(a) of the *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016). Australia signed the Paris Agreement on 22 April 2016 and ratified it on 9 November 2016.

60 ICJ Advisory Opinion at [94] (the Court) (emphasis added).

61 ICJ Advisory Opinion at [427] (the Court).

emissions to be undertaken within their jurisdiction or control, on the basis of the best available science", including to assess "possible downstream effects".[62]

Part V Estimated time

50. If leave be granted to make oral submissions, MCF estimates it would require 20 minutes.

Dated 19 March 2026

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62 ICJ Advisory Opinion at [298] (the Court).

ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1.	*Environmental Planning and Assessment Act 1979* (NSW)	29 Jul 2022 to 27 Nov 2022	ss 1.3, 1.4, 4.15, 4.16, 4.38	Version in force at the time of the decision of the Second Respondent	6 Sept 2022
2.	*Environmental Planning and Assessment Act 1979* (NSW)	Current	s 4.15	For illustrative purposes	N/A
3.	*Protection of the Environment Administration Act 1991* (NSW)	3 March 2022 to 23 October 2023	s 6	For illustrative purposes; version in force at the time of the decision of the Second Respondent	6 Sept 2022