HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

No S174/2025

BETWEEN:

MACH ENERGY AUSTRALIA PTY LTD
ABN 34608495441
Appellant

and

DENMAN ABERDEEN MUSWELLBROOK SCONE HEALTHY ENVIRONMENT GROUP INC
First Respondent

INDEPENDENT PLANNING COMMISSION OF NSW
Second Respondent

APPELLANT'S SUBMISSIONS IN REPLY

PART I FORM OF SUBMISSIONS

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

PART II REPLY

A GROUND 1

2. The Respondent submits that, on its proper construction, s 4.15(1)(b) "requires consideration of likely impacts on the environment at least in the vicinity of the development": eg RS [22], [26]. That gloss ("at least") is unjustified by any consideration of text, context or subject matter in the Act.[1] It was not the construction articulated by the NSWCA: cf RS [25], noting that RS [26]-[31] does not reflect the NSWCA's reasoning. The words "at least" are nowhere in the relevant paragraphs of the reasons for judgment of Ward P or Adamson JA: cf RS [22], [25]-[26], [28]. Nor was this the construction advanced by the Respondent in the NSWCA: eg **AFM 266.12-18, 268.13-28, 270.19-30, 292.5-6**.

3. Instead, the dispositive reasoning of the NSWCA was that s 4.15(1)(b) is "centrally concerned" (eg JA [109]) with impacts "of the proposed development on the locality of the development": see AS [23], [32]. Contrary to the RS, this error was central to the NSWCA's disposition of the appeal: **JA [107]-[109]** (Ward P), **[236]-[238]** (Adamson JA).

4. The correct construction is that s 4.15(1)(b) reposed in the IPC itself the function of deciding which likely environmental impacts were relevant (whether in the locality or otherwise[2]), and how those matters were engaged: AS [30]. It was the IPC's views on relevance which mattered.[3] The Project's postulated environmental impact in the locality via the altered climate resulting from its GHG emissions was not a consideration which the statute required the IPC to consider. The NSWCA erred in holding otherwise.

B GROUND 2

5. In another pivot away from the reasoning of the NSWCA, the Respondent submits that the IPC erred because it "failed to address at all" certain matters identified in the EIS: RS [39], see also [40]. This is different from the Respondent's argument in the NSWCA: see AS [46];

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[1] The provisions cited at RS [28] which focus on the community or location of a development only highlight that Parliament has not, in s 4.15(1)(b), required express focus upon environmental impacts of a development in any particular location.

[2] Contrary to RS [27] and [31], the Appellant has never contended that the IPC would or should ignore local environmental impacts. Such an *in terrorem* argument should be rejected, and is apt to introduce notions of unreasonableness not pressed below nor in this Court.

[3] In a different context, see *TGWR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 200 at [20] (Lee, SC Derrington and Cheeseman JJ).

AFM 262 [65]. Plainly enough, it is a different species of error to a failure to consider a mandatory consideration, which was the basis of the NSWCA's decision.

6. In any event, the argument mischaracterises the contents of the EIS. In the EIS, the Appellant acknowledged that GHG emissions would "contribute in some way towards the potential global, national, state and regional effects of climate change": **RFM 80 [5.4]**; see also **RFM 23-24 [7.21.3]**. But the particular passages of the EIS relied upon by the Respondent (see RS [14], [39], [40]) are drawn from section 7.21.5 of the EIS (**RFM 24-25**), which dealt not with potential impacts of the Project, but instead with potential impacts of climate change on the Project from day one of its implementation. The EIS did not state, nor imply, that the Project's emissions would themselves create specific impacts in the locality of the Project: cf RS [43]. Its treatment of climate change impacts of the Project (in section 7.21.3 and section 5.4 of Appendix S) did not involve consideration of the locality at all in respect of Scope 3 emissions. On a fair reading of sections 5.3 and 5.5 of Appendix S, the EIS did not suggest that there is a disproportionate impact of climate change in NSW or the Hunter: cf RS [14]. Against that background, the IPC cannot be criticised for proceeding on the basis that the impacts of GHG emissions are "felt globally": at **AFM 207 [70], 219 [152]**.

7. In so far as the Respondent seeks leave to amend its Notice of Contention to raise this point (cf RS [32], fn 19), it should be refused. The argument lacks merit for the reasons just given.

8. Contrary to RS [34], the Appellant does not deny that s 4.15(1)(b) calls for a causal inquiry. The point made at AS [45]-[46] is that the provision does not expressly or by necessary implication call for a causal inquiry as to the impacts of climate change on the environment. The NSWCA failed to identify how the subject matter, scope and purpose of the EPA Act gave rise to such an implication. Neither of the authorities relied upon at RS [35]-[36] requires any different conclusion, because neither speaks to the level of particularity at which s 4.15(1)(b) falls to be considered.

C GROUND 3

9. Contrary to RS [42], Ground 3 does not involve a "drop in the ocean" argument. No part of the Appellant's argument rests on the relative size of projected emissions of the Project.[4]

[4] In its EIS, the Appellant recognised that Scope 3 emissions attributable to the Project would represent 0.065% of the total anthropogenic GHG emissions globally, and acknowledged that Scope 1 and 2 emissions of the Project would be "significantly less" than attributable Scope 3 emissions: **RFM 23-24**; **JA [146]**.

10. Nor does the Appellant suggest that it is impossible to identify the increased effects of extreme weather events caused by climate change: cf RS [49]. Ground 3 can be decided by accepting, consistently with RS [44], that the Project will generate GHG emissions as a result of the combustion of coal; and that combustion of coal is a major contributor to anthropogenic climate change including as experienced in NSW. So much is accepted at AS [17]-[18], [61]. The Appellant's point is that that cannot satisfy the causal inquiry which (on the NSWCA's approach) s 4.15(1)(b) requires, namely, whether the impact of climate change is a likely environmental impact of the development in the locality.

11. The fundamental reason why that causal inquiry cannot be satisfied is that it is not possible to say that the particular Scope 3 emissions generated as a result of the Project will themselves have any particular local impact in NSW. That was common ground in this case where the trial judge recorded that it was uncontested that "the impacts associated with combustion emissions cannot be isolated to particular geographical locations": **PJ [90], [131]**. This was consistent with the Respondent's submission to the IPC, in which it quoted Professor Sackett, stating "every tonne of GHG emission leads to (more) dangerous warming. It is not possible to know which amount, <u>from which source</u>, will precipitate environmental subsystems, including those in NSW, to tip irreversibly": **Appellant's Supplementary Further Materials, 4 [178]** (emphasis added). Contrary to RS [43], it is wrong to suggest that there was an acceptance in the EIS that <u>the Project's</u> GHG emissions would contribute to specific climate change impacts in the local area: see [6] above.

12. For these reasons, Ground 3 raises no matter that could have been met by evidence below: cf RS [45], fn 38. Nor is there substance in the contention that Ground 3 is a departure from the Appellant's case below: RS [44]-[45]. Ground 3 arises because of the NSWCA's finding that the impacts of climate change in the locality were capable of being environmental impacts of the Project within the meaning of s 4.15(1)(b). That finding itself arose from the Respondent putting a case different to that which it had put before the trial judge (where the Respondent's case was that the IPC failed to consider the effects of Scope 3 emissions on climate change generally): see **PJ [90], [95], [100]**.

E NOTICE OF CONTENTION

13. The Respondent contends that the interaction between s 4.15(1)(a)(i) of the EPA Act, and cl 2.20(1)(c) of the Resources SEPP, required the IPC to consider whether to impose conditions aimed at Scope 3 emissions to a greater degree than the IPC in fact did: **CAB 219**. The notice of contention should be dismissed: *first*, because it misconstrues the relevant obligation; and/or *second*, in any event, because the IPC did consider the suggested matter.

14. ***The nature of the obligation***: Section 4.15(1)(a)(i) of the EPA Act required the IPC to "take into consideration … the provisions of … any environmental planning instrument" of relevance. The Resources SEPP was one such instrument. Clause 2.20(1)(c) of the Resources SEPP provided that a consent authority must 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". As Beech-Jones JA observed in *Ross v Lane*:[5]

> Although many environmental planning instruments … are drafted in terms that purport to dictate the matters that must be considered by the consent authority in determining a DA, they do so from a shaky premise. … A statutory requirement to take an instrument "into consideration" … [does not require] the decision maker to apply the instrument as though it were a binding statute.

15. The Respondent's contention adopts the same "shaky premise". Section 4.15(1)(a)(i) of the EPA Act obliged the IPC only to consider the terms of the Resources SEPP, not to treat it as a binding statute. The Respondent overlooks the proper operation of s 4.15(1)(a)(i).

16. Further, cl 2.20(1)(c) is only capable of requiring the IPC to consider whether to impose conditions directed to minimising "greenhouse gas emissions". The IPC plainly did turn its mind to whether such conditions should be imposed (the Respondent embraces its reasons in that regard). But cl 2.20(1)(c) does not descend to the level of particularity nominated by the RS, namely Scope 3 emissions. Even on the most expansive view of s 4.15(1)(a)(i), it could not require the IPC to consider something not mentioned by cl 2.20(1)(c).

17. In the result, Adamson JA was correct to identify that the Respondent is attempting to turn an alleged failure to consider the terms of cl 2.20(1)(c) into an assessment of the adequacy of the consideration accorded in a particular case: **JA [232]** (Adamson JA).[6] *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd*[7] (RS [54]) does not support any more specific approach to s 4.15(1)(a)(i) and cl 2.20(1)(c) than was taken here, given the proposed conditions in that case did not address Scope 3 emissions.[8]

18. ***The IPC sufficiently considered cl 2.20(1)(c)***: Even if the IPC was bound to consider the terms of cl 2.20(1)(c) at the level of particularity contended for by the Respondent, the IPC did so. The Court of Appeal was correct in so concluding: **JA [81]-[83]** (Ward P), **[229]-[233]** (Adamson JA); also **PJ [78], [81], [111]**; cf RS [62]-[63]. *First*, the IPC was plainly

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5 [2022] NSWCA 235 at [37] (Beech-Jones JA dissenting, however the other judges did not address this point).
6 *Walker* (2008) 161 LGERA 423; [2008] NSWCA 224 at [35]. Notably, there is no challenge to JA [230].
7 (2021) 252 LGERA 221; [2021] NSWLEC 110.
8 *Mullaley* (2021) 252 LGERA 221 at [37]-[38] (Preston CJ, LEC).

aware of the statutory task. It set out the text of cl 2.20(1) (**AFM 216 [137]**);[9] directed itself to the Resources SEPP as a mandatory consideration (**AFM 199 [35]**);[10] confirmed it had read and agreed with the Department's assessment of the Resources SEPP (**AFM 199 [35]**); and said it had considered the matters in cl 2.20(1) (**AFM 219 [154]**).

19. *Second*, the IPC was "clearly cognisant of the distinction between the three categories" of emissions: **JA [81]**; cf RS [19], [58], [61]. It identified the categories (**AFM 214 [125]ff**); noted that GHG emissions (including Scope 3) was a "key issue" raised (**AFM 207 [69]-[70]**); and found Scope 3 emissions would contribute to climate change: **AFM 219 [150]**.

20. *Third*, the conclusion that the Project, "[s]ubject to the imposed conditions", could "achieve the requirements of the Resources SEPP" and the EPA Act with respect to GHG emissions was reached after express discussion of the management of Scope 3 emissions: **AFM 221 [161]**. That is at least "sufficient indication" that, in the IPC's view, it was not necessary or appropriate to impose Scope 3 minimisation conditions: **JA [81]** (Ward P); cf RS [58], [61].

21. *Fourth*, the IPC noted that it had given careful consideration to material including the Respondent's submissions, in which (as the Respondent notes: RS [58]) it "drew to the IPC's attention that no Scope 3 minimisation conditions had been proposed": **AFM 195-196 [16]**. *Fifth*, no party or stakeholder before the IPC proposed any minimisation conditions for Scope 3 emissions. It is unsurprising in those circumstances that the IPC approached the possibility of regulation of Scope 3 emissions as it did: see **JA [82]** (Ward P).

22. The IPC's detailed reasons on this issue preclude any inference that the IPC failed to consider whether conditions ought be imposed to minimise Scope 3 emissions. The NSWCA was correct to so conclude.

Dated: 26 March 2026

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9 See *KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc* (2021) 250 LGERA 39; [2021] NSWCA 216 at [142] (Preston CJ, LEC).

10 See *Hill v Woollahra Municipal Council* (2003) 127 LGERA 7; [2003] NSWCA 106 at [53] (Hodgson JA, Ipp JA and Davies AJA agreeing).