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

No S174/2025

BETWEEN:

MACH ENERGY AUSTRALIA PTY LTD
ABN 34608495441
Appellant

20 and

DENMAN ABERDEEN MUSWELLBROOK SCONE HEALTHY ENVIRONMENT GROUP INC
First Respondent

INDEPENDENT PLANNING COMMISSION OF NSW
Second Respondent

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FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

10 1. This outline of oral submissions is in a form suitable for publication on the internet.

The appellant's position in its EIS and the Courts below (RS[9]-[14], [43]-[45])

2. Detailed prescription was made in the regulatory framework, including in cl.7 of the *Environmental Planning and Assessment Regulation 2000* (NSW) (**EPA Regulation 2000**) (**JBA, Vol 2, Tab 9**), and the Secretary's Environmental Assessment Requirements (**SEARs**) **(RFM 5),** for the identification in the EIS of likely impacts of the development, which the appellant was required to certify. The appellant confirmed in its EIS that **(a)** the Project's GHG emissions would make a proportionate contribution to "climate change, including the associated environmental impacts" (**RFM 23, 54**); **(b)** that all sources of GHG emissions contribute to potential "global, national, state and regional
20 effects of climate change" (**RFM 53, 80**); and **(c)** the effects of climate change in the vicinity of the Project are expected to include more frequent extreme temperatures, more prevalent bushfires and more frequent heavier rainfall events (**RFM 24, 81-82**). Likewise, the appellant accepted in its NSWCA written submissions (**RFM 221** at [2]) and oral submissions (**AFM 295** – T31/37 to T32/23, **AFM 298-299**) that the Project's GHG emissions had adverse impacts on the environment including in NSW and the locality.

Section 4.15(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW) (EPAA)

3. Section 4.15(1)(b) calls for a forward-looking, predictive exercise. "Impacts" means the effects or influences of an action. "Likely" means a "real chance or possibility": ***Hoxton***
30 ***Park*** *Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349; (2011) 81 NSWLR 638 (**JBA Vol 5, Tab 22, 1155**) at [46]. Section 4.15(1)(b) thus requires that an impact "be one flowing from the development" and so requires consideration of "the chain of likely consequences": at [44], [46]. A consent authority must consider whether something is a likely impact, and if it is, consider it. All impacts found to be likely by the consent authority must be considered: [53].

The IPC was required to consider the impacts of climate change in the locality (Ground 1)

4. The NSWCA did not decide, as a matter of statutory construction, that the word "locality" restricted the phrase "environmental impacts on both the natural and built environments" and was responding to the evidence as to likely (and disproportionate) impacts in the

10 locality. The evident purpose of the EPAA and the history of s 4.15(1)(b) confirm that a consent authority's consideration of the likely impacts of a development must include (but is not limited to) consideration of likely impacts on the environment in the vicinity of the development: **RS[26]-[31]**.

5. But in any event, given the appellant's acknowledgement in its EIS of the Project's contribution to climate change and the consequential (and disproportionate) adverse effects of climate change on the environment in the Hunter region, the IPC was required to have regard to those likely impacts, as the NSWCA held at [236]-[237] (**CAB 196-197**): **RS[32]-[33]**.

Consideration of the "likely impacts of the development" requires consideration of the
20 **development's chain of consequences (Ground 2)**

6. A consent authority cannot limit its consideration of the likely impacts of a development only to the first link in the chain. *Hoxton Park* and *Minister for Environment and Heritage v Queensland Conservation Council* [2004] FCAFC 190; (2004) 139 FCR 24 (**JBA Vol 6, Tab 27, p1668**) both illustrate this: **RS[35]-[36]**. The material before the IPC, including the EIS, required the IPC to consider not only the likely impacts of the Project's GHG emissions on global warming, but also whether the consequential impacts of that warming on the environment including in the Hunter region were likely impacts and if so, to take them into account: **RS[40]**.

The alleged "logical fallacy" is contradicted by evidence and case law (Ground 3)

30 7. The appellant did not suggest in its EIS or in the courts below that the Project's GHG emissions would not contribute "in a detectable or meaningful way" to the local impacts of climate change (**AS[61]**). To the contrary, its EIS and its submissions to the NSWCA accepted that it would: paragraph 2 above. Ground 3 is an impermissible departure from the appellant's earlier position and special leave for Ground 3 should be revoked.

8. The evidence before the IPC, including that of Professor Sackett (**RFM 119**) and the IPCC *Summary for Policy Makers* (**RFM 176**), provided a scientific basis to establish a sufficient causal link between the Project's emissions and likely impacts on the environment in the vicinity of the Project. The causal link exists because of the cumulative impact of GHG emissions. Every source of GHG emissions, including the

10 Project, consumes the carbon budget remaining to hold global warming to 1.5^{O}C. Every increment by which that temperature is exceeded increases the likelihood and severity of adverse impacts on the environment, including in the Hunter region (**RS[50]**).

9. Courts have not found it difficult - let alone impossible – to accept or find that one source of emissions can contribute to climate change impacts in a particular locality or area: (cf **AS[64]**). That is the case for Australian courts (**RS[46]-[48]**), and foreign and international courts (**RS[49]**) including the International Court of Justice in its July 2025 *Advisory Opinion* (especially at [72]-[83], [429] and [433]-[438]) (**JBA Vol 5, Tab 23, 1173**).

Notice of contention: Failure to consider conditions relating to Scope 3 emissions

20 10. The obligation in s 4.15(1)(a) and cl.2.20(1)(c) of the Resources SEPP (**JBA Vol 1 Tab 4)** to consider whether a consent should be issued subject to conditions to ensure that GHG emissions "are minimised to the greatest extent practicable", requires separate consideration of Scope 1, Scope 2 and Scope 3 emissions. The Resources SEPP was drafted against the backdrop of the GHG Protocol, which is a globally accepted accounting and reporting standard dividing emissions into three scopes. "Greenhouse gas emissions" in cl.2.20(1)(c) of the Resources SEPP include Scope 3 emissions (RS[55]-[56]). It is necessary to separately consider "minimisation" conditions for each of Scope 1, Scope 2 and Scope 3 emissions since what is required by a proponent to "minimise [the emissions] to the greatest extent practicable" will be of a different order for each
30 scope.

11. Contrary to CA[81], [229] (**CAB 151, 194**), the IPC's reference to Scope 3 emissions being "regulated" and accounted for elsewhere was not an indication that it considered whether or not to impose "minimisation" conditions and misunderstands the Paris Agreement. The appellant and Department failed to identify Scope 3 conditions as an issue for the IPC's resolution and it was inapposite to suggest that a community organisation made a "forensic choice" in not proposing any CA[54], [83] (**CAB 143, 151**).

13 March 2026 **Naomi Sharp SC**