A New Frontier for Project-Based Climate Litigation

Scope 3 Accounting, Responsibility, and Control in the MACH Energy v Denman Decision

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On 7 October 2026, the High Court of Australia held, by three judges to two, that a New South Wales (NSW) planning authority must consider conditions to limit a coal mine's scope 3 emissions. This meant the authority could not simply say they had considered those emissions, representing 98% of the project's greenhouse gas (GHG) emissions – they had to show they had considered planning conditions that would minimise them.

Although much of the Australian apex High Court ruling in *MACH Energy Australia Pty Ltd v Denman Aberdeen Muswellbrook Scone Healthy Environment Group Inc [2026] HCA 35* turns on the interpretation of very specific NSW statutory language, it nevertheless has important implications for climate litigation elsewhere in the world, including in Europe.

Those implications are principally centred around the issue of scope 3 GHG emissions – those associated with a company's value chain, whether upstream or downstream. It is far from the first case to consider scope 3 emissions in fossil fuel project cases – many have already established that these emissions must be included in an environmental impact assessment (EIA), including the 2006 Australian *Anvil Hill* case and the UK Supreme Court *Finch* ruling (see here). What it adds, though, is judicial discussion of the extent to which scope 3 has to be considered by planning authorities in project cases. The High Court decision makes it clear that scope 3 emissions must be considered as a likely impact of the development [31]. More striking is what it says the planning authority needs to consider doing, through the imposition of planning conditions, to minimise scope 3 emissions to the greatest extent practicable. There is a world of difference between merely considering scope 3 emissions in a loose sense on the one hand and, on the other, considering what planning conditions could be imposed on scope 3 emissions. The latter is where the case's novel contribution really lies.

Corporate versus state emissions accounting and reporting rules

Two issues in particular stand out in relation to that conditions point. The first is the judicial treatment of scope 3 emissions and their relationship with state-party accounting rules for GHG emissions under the United Nations Framework Convention on Climate Change and the Paris Agreement. Scope 3 emissions are principally associated with corporate climate accounting and reporting rules set out in the GHG Protocol standards. Under the treaty rules, found in the Intergovernmental Panel on Climate Change Guidelines for National Greenhouse Gas Inventories, states are only required to account for emissions arising on their own state territory and not for emissions abroad, whether those foreign emissions are associated with the manufacture of imported products (upstream "consumption" emissions) or from the consumption of exported products like fossil fuels which are burned abroad (downstream "combustion" emissions). The two sets of rules are not the same – one applies to companies and the other to states. However, there are some parallels, especially regarding a coal exporting state like Australia, because most of the emissions from its coal companies and their mining projects will come in the form of scope 3 emissions abroad. In state accounting terms, these do not count as Australia's emissions for the purposes of its Nationally Determined Contribution under the Paris Agreement. Not all scope 3 emissions arise abroad

though – some coal is sold and burned domestically, and there the scope 3 emissions will be at home in Australia.

The connection between the two arose in the case because the relevant statute required the planning commission hearing the application for an extension of the coal mine to "consider whether or not the consent should be issued subject to conditions … to ensure … that greenhouse gas emissions are minimised to the greatest extent practicable" [85, 285]. The Commission had stated that "although the Project's Scope 3 emissions would contribute to anthropogenic climate change" these would be "appropriately regulated and accounted for through broader national policies and international agreements (such as the Paris Agreement)" [132].

The Court of Appeal's response to this had been to say that "The fact that the Commission accepted that Scope 3 emissions were 'regulated' as well as accounted for elsewhere is a sufficient indication that the Commission considered there to be no need for the imposition of [planning] minimisation conditions in relation to the Scope 3 emissions" [143]. The High Court rejected the Court of Appeal's approach, arguing that it had erred in treating that "regulated and accounted elsewhere" point as evidence that the Commission had considered whether conditions should be imposed to minimise to the greatest extent practicable, which included scope 3 emissions. For the majority in the High Court, the issue of how scope 3 greenhouse gas emissions were accounted for or regulated was different to the issue of their minimisation as far as practicable, which the Commission was required to consider [183].

Responsibility for scope 3 emissions

In reaching that conclusion, the High Court also touched on the question of responsibility, arguing that "whether Australia as a country, or MACH as the proponent, could or should ultimately be responsible for all of the Project's greenhouse gas emissions (including Scope 3 emissions)" did not address the minimisation point which the Commission was required to consider [183]. The responsibility issue is an important one. Under international climate treaty law, as we have seen, Australia is only legally responsible for emissions on its own territory, including scope 3 emissions from burning coal at home. One can therefore see why a planning authority might be tempted to think that it need not consider scope 3 emissions which occur abroad. If they are not Australia's legal responsibility under the climate treaties, why should an Australian planning decision-maker be bothered about them? The reason is that they do still engage a legal responsibility under a different, customary source of international law: state responsibility. The ICJ Advisory Opinion on climate change makes it clear that fossil fuel states have a due diligence obligation to take appropriate regulatory action in relation to fossil fuel production, including the granting of fossil fuel exploration licences and the provision of fossil fuel subsidies, and that failing to do so may constitute an internationally wrongful act attributable to that State. For present purposes, that regulation of course includes planning permission. It may involve refusing permission in some instances, or imposing conditions on scope 3 emissions in others, given that those emissions form the bulk of emissions from fossil fuel projects.

State treaty accounting and reporting responsibility and state responsibility regarding mitigation overlap in part (in that a state's failure to regulate its territorial emissions may be a basis for breach of its due diligence obligations). However, state responsibility for mitigation is wider in that a state must also regulate fossil fuels where the emissions will occur abroad. Finally, corporate responsibility is not the same as state responsibility of either type. Under corporate climate disclosure rules, companies are typically responsible for reporting all of their emissions, including upstream and downstream scope 3 emissions at home or abroad. That is unlike state accounting and reporting responsibility, which, as we have seen, is limited to emissions on their home territory.

Control of scope 3 emissions

The second key issue from the High Court ruling is about what conditions might be imposed by a planning

authority on scope 3 emissions. In other climate litigation globally, companies have often sought to argue that they should not be responsible for setting targets for and reducing their scope 3 emissions because these are beyond their "control" (Hilson, OJLS, forthcoming). This issue of control also features in the *Denman* High Court judgment. The relevant passage mentions a previous case (*Mullaley*) where the planning Commission had expressed the view that the scope 3 emissions were "outside the direct control of the Applicant and therefore not able to be reasonably conditioned" [173]. The High Court rejects this, arguing that while "some aspects of Scope 3 emissions will be beyond the direct control of the development proponent", there were some planning conditions that it was perfectly possible for the planning authority to consider imposing in order to minimise scope 3 emissions to the greatest extent practicable [199]. It cited with approval Adamson JA's judgment from the Court of Appeal, which had stated that:

> *There was plainly much more that the Commission could have done by imposing conditions in relation to the 98% of emissions which would be generated by the [P]roject. It could, for example …have imposed conditions such as requiring the coal to be washed before it is exported; limiting the coal that is exported to coal of a certain high calorific content or that the coal be exported only to those countries which have NDCs under the Paris Agreement … ; requiring that coal exported from the [P]roject only be used in power stations which use technology such as carbon capture and storage or fluidised bed combustion; or requiring that MACH implement offsets to the emissions caused by the coal.*

As the High Court judgment noted, those conditions mostly relate to downstream scope 3 emissions, but it would also be possible to use offsets to cover any relevant upstream scope 3 emissions [200]. The judgment also mentioned other conditions that could in theory be imposed, including limiting the total production output of the mine, or requiring MACH to sell coal from the project only to countries that had committed to making significant reductions in their GHG emissions [200]. What was clear, though, was that the Commission in the *Denman* case was required to consider imposing such conditions aimed at ensuring that all GHG emissions, including scope 3 (both upstream and downstream), were minimised to the greatest extent practicable, and it had not done so [200].

This is important for future climate litigation cases considering arguments about the ability to control scope 3 emissions. Companies often claim that while they have control over their scope 1 and 2 emissions (onsite emissions and bought-in energy respectively), they can't control scope 3 emissions arising from what their consumers do with their product on the demand side. At that point, it is out of their hands. But what the judgment here makes clear is that there is a range of things that fossil fuel companies can do to control their scope 3 emissions, including many on the supply side before it reaches those consumers.

The new frontier for project-based climate litigation

The issue of conditions is likely to be the new frontier in project-based climate litigation. It is now common ground to say that scope 3 emissions must be included in an EIA, and that planning authorities must consider them. But what they need to consider doing to help minimise them as far as possible is the next step. Not all statutes will have a requirement to mandate such a consideration as specific as the NSW one in *Denman*. However, national courts globally all need to give serious attention to the matter and ensure that they adopt something like it in project cases that come before them. After all, what's the point of requiring a planning decision-maker to consider scope 3 emissions if they are then simply allowed to dismiss the issue without considering what action they might take to combat them? That does not meet the demands of the climate crisis we are facing. Nor is it likely to meet the demands of the ICJ's opinion.

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