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Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	9/06/2026 4:59:24 PM AEST
Date Accepted for Filing:	9/06/2026 4:59:28 PM AEST
File Number:	VID1357/2025
File Title:	FRIENDS OF AUSTRALIAN ROCK ART INC v MINISTER FOR ENVIRONMENT AND WATER & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

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FEDERAL COURT OF AUSTRALIA No VID1357/2025
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

FRIENDS OF AUSTRALIAN ROCK ART INC
Applicant

MINISTER FOR ENVIRONMENT AND WATER
First Respondent

WOODSIDE ENERGY LTD (ACN 005 482 986)
Second Respondent

OUTLINE OF SUBMISSIONS OF THE SECOND RESPONDENT

A. OVERVIEW

1. On 12 September 2025, under ss 130(1) and 133(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth),[1] the First Respondent[2] approved the Second Respondent's[3] proposed action[4] to continue and extend the operating life of the North West Shelf Project through the long term processing of third party gas and fluids and North West Shelf Joint Venture field resources through the North West Shelf Project facilities,[5] including at the Karratha Gas Plant in Western Australia (**Approval Decision**). The approval has effect until 31 December 2070.

2. The environmental issue that was the focus of the Approval Decision was the potential impact of industrial emissions from the Karratha Gas Plant on the rock art of the Dampier Archipelago (including the Burrup Peninsula[6]) National Heritage place. That focus was the consequence of an earlier decision[7] of a delegate of the Minister that the "*controlling provisions*" for the action were those related to National Heritage values (ss 15B and 15C) and the Minister's subsequent refusal to revoke that decision. The conditions attached to the approval impose specific limits on emissions of NOx, SO_2,

[1] The **Act**.
[2] The **Minister**.
[3] **Woodside**.
[4] Being the action the subject of the referral under the Act: Decision Brief, Document F17 at section 1.2, cf. at section 1.2.3. See also at paragraph 23 below.
[5] The **NWS Facilities**, being those facilities set out at section 1.2.1 of the referral: Decision Brief, Document F17.
[6] The Karratha Gas Plant is located on the Burrup Peninsula.
[7] The **Controlled Action Decision**: Decision Brief, Document F16.

VOCs, CO, CO_2, CH_4 and particulate matter,[8] and bind the approval holder irrespective of the source or composition of the gas and fluids that will be processed at the Karratha Gas Plant (known as "***feedstock***").

3. The Applicant[9] has brought an application seeking judicial review of the Approval Decision on seven grounds. Woodside does not dispute its standing to do so.

4. None of the grounds should succeed. They can be summarised, with Woodside's summary response to each, as follows.

5. **Ground 1** (failure to consider economic detriment) contends that the Approval Decision was vitiated by a failure to consider economic detriment caused by the Approval Decision. The arguments in support of Ground 1 impermissibly read limits into s 136(1)(b) of the Act that are inconsistent with the statutory text. Section 136(1)(b) requires the Minister to consider "*economic and social matters*" but leaves it to the Minister to determine which ones. In any event, to the extent that Ground 1 is based on there having been submissions before the Minister that made reference to "*economic detriments*", it cannot be inferred from the Minister's reasons for the Approval Decision[10] that the Minister did not consider that material, including because the absence of express reference was also consistent with the Minister having given it minimal weight.

6. **Ground 2** (legal unreasonableness in relation to consideration of economic matters) contends that the Approval Decision was vitiated, in particular, by a reference in the reasons to the combined benefits of the NWS Project Extension and a different proposed undertaking, known as the "**Browse development**", which was (and as at the date of these submissions is) under assessment and yet to be approved.[11] The arguments in support of Ground 2 misconstrue the Minister's reasoning, impermissibly read limits into s 136(1)(b) of the Act and fail to demonstrate any irrationality in the Minister's reasoning.

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8 These chemical compounds are defined in Part C of the Approval Decision as follows: NOx means nitric oxide (NO) and nitrogen dioxide (NO_2); SO_2 means sulfur dioxide; VOCs means volatile organic compounds including benzene, toluene, ethylbenzene, xylenes and naphthalene (BTEX-N); CO means carbon monoxide; CO_2 means carbon dioxide; CH_4 means methane.

9 **FARA**.

10 **Reasons**.

11 The Browse development is the subject of EPBC Referral Number 2018-8319. See Reasons at [249].

7. **Grounds 3, 4 and 5** are each concerned, one way or another, with the relationship between the proposed approval and the Approval Decision and the changes to the conditions made between the two. Ground 3 is to the effect that the Minister impermissibly failed to consider whether, in light of amendments to the conditions, the possible impacts of the action were still acceptable. Ground 4 is to similar effect, but focused on the condition-making power in s 134 of the Act: it is said that the Minister lacked a rational basis to form the view required by the statute that the conditions were necessary or convenient. Ground 5 is to the effect that it was not permissible for the Minister to take into account the feasibility of the conditions. Those arguments misconstrue what occurred between the proposed approval and the Approval Decision. In any event, FARA's dissatisfaction with the merits of revisions made to the conditions does not correspond to any error of law affecting the exercises of power in question. It is not impermissible to have regard to the feasibility of conditions from a proponent's perspective.

8. **Ground 6** contends that, properly construed, s 137A of the Act requires the Court to determine for itself, as a matter of objective fact, whether the Minister acted inconsistently with the National Heritage management principles. That is not correct.

9. **Ground 7** contends in the alternative to Ground 6 that the state of mind formed by the Minister for the purpose of s 137A(a) of the Act was legally unreasonable because Reasons [294] is the dispositive paragraph and that paragraph was taken directly from [274] of the allegedly "*outdated*" Legal Considerations Report. That contention must fail. Reasons [288]–[293] provide an amply intelligible justification for the conclusion at Reasons [295] that the Minister was not acting inconsistently with the principles in this case. Reasons [294] was independent and separate to the Legal Considerations Report which was before the Minister but was not the only document before the Minister. Further, even if the reference to [274] of the Legal Considerations Report was an error it was not material.

10. Woodside relies on the affidavit of Stacey Rose Giunta affirmed on 7 April 2026.[12]

[12] **Giunta Affidavit**.

B. LEGISLATIVE PROVISIONS

11. The issues in the present proceeding arise from action taken pursuant to the legislative scheme under the Act relating to the approval of a "*controlled action*". The Act, reflecting the federal context, protects particular environmental matters, being "*matters of national environmental significance*" or "***MNES***". That scheme is relevantly as follows.

12. An action which a person proposes to take is a "*controlled action*" if the taking of the action by the person without approval under Part 9 for the purposes of Part 3 would be prohibited by the provision (s 67).

13. Within Part 3:

    13.1 Section 15B relevantly provides that a constitutional corporation must not take an action that has, will have or is likely to have a significant impact on the National Heritage values of a National Heritage place.[13]

    13.2 Section 15C relevantly provides that a constitutional corporation will commit an offence if it takes an action that results or will result in a significant impact on the National Heritage values of a National Heritage place.

14. A person proposing to take an action that the person thinks may be a controlled action must refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action (s 68(1)).

15. The Minister must decide whether an action that is the subject of a proposal referred to the Minister is a controlled action and which provisions of Part 3 (if any) are controlling provisions for the action (s 75(1)). The premise of an action being a controlled action is that it has, will have or is likely to have a significant impact on a MNES.

16. If the Minister has decided that an action is a controlled action, the Minister must decide which of a number of approaches must be used for the assessment of the relevant impacts of the action, which approaches include assessment by an accredited assessment process carried out under a law of a State (s 87(1) and (4)(a)). The

[13] A "National Heritage place" is a place included in the National Heritage List: s 324C(3) of the Act. The "National Heritage values" of a National Heritage place are the National Heritage values of the place included in the National Heritage List for the place: s 324D(2) of the Act.

assessment of the relevant impacts of a controlled action is undertaken in accordance with the provisions of Part 8 of the Act (s 81).

17. A person may request the Minister to reconsider a decision made under s 75(1) about an action on the basis of a matter referred to in any of ss 78(1)(a) to (ca) (s 78A(1)). This includes the basis that there is substantial new information about the impacts that the action has or will have, or is likely to have, on a matter protected by a provision of Part 3 (s 78(1)(a)). An event or circumstance is an "*impact*" of an action if, for an event or circumstance that is an indirect consequence of the action, subject to s 527E(2), the action is a "*substantial cause*" of that event or circumstance (s 527E(1)(b)).

18. Before the Minister decides whether or not to approve the taking of an action, and what conditions (if any) to attach, he or she must inform the person proposing to take the action, and the designated proponent, of the decision the Minister proposes to make and any conditions the Minister proposes to attach and invite the person informed to give to the Minister, within 10 days, comments in writing on the proposed decision and any conditions (s 131AA(1)(a)). The Minister must take those comments into account in deciding whether or not to approve the taking of the action (s 131AA(6)).

19. After receiving the assessment documentation relating to a controlled action, the Minister may approve the taking of the action by a person for the purposes of a controlling provision (s 133(1)).

20. The Minister may attach conditions to the approval if he or she is satisfied that each condition is necessary or convenient for protecting from the action any matter protected by a provision of Part 3 for which the approval has effect (s 134(1)(a)). When deciding whether to attach a condition to an approval, the Minister is required to consider information provided by the person proposing to take the action or by the designated proponent of the action (s 134(4)(aa)).

21. Considerations to be taken into account in the making of a decision under s 133 include economic and social matters (s 136(1)(b)).

C. RELEVANT BACKGROUND

22. At a high level, the general background to the proceeding is as follows.

Referral

23. On 22 November 2018, Woodside referred an action to the Minister under s 75 of the Act.[14] The referred action was described as follows, and is referred to in these submissions as the NWS Project Extension[15] or the "*proposed action*":[16]

> The North West Shelf (NWS) Project is one of the world's largest liquefied natural gas (LNG) producers, supplying oil and gas to Australian and international markets from offshore gas, oil and condensate fields in the Carnarvon Basin off the north-west coast of Australia …
>
> Woodside Energy Ltd. (Woodside), as operator for and on behalf of the of the North West Shelf Joint Venture (NWSJV), is proposing to continue and extend the operating life of the NWS Project through the long-term processing of third party gas and fluids and NWSJV field resources through the NWS Project facilities.
>
> The addition of third party gas and fluids to NWSJV field resources has the potential to allow for the ongoing operation of the NWS Project until around 2070 and will provide domestic gas and an ongoing supply of LNG, liquefied petroleum gas (LPG) and condensate to domestic and international markets.

Controlled action decision

24. On 3 May 2019, a delegate of the Minister determined under s 75 of the Act that the proposed action was a controlled action and that the controlling provisions were ss 15B and 15C (National Heritage values of a National Heritage place).[17] The relevant National Heritage place was the Dampier Archipelago (including Burrup Peninsula).

25. The delegate further decided that the proposed action be assessed by an accredited assessment process under s 87(1)(a) of the Act, being assessment by the Western Australian Environmental Protection Authority (**WA EPA**) under the *Environmental Protection Act 1986* (WA) (**WA EP Act**). The level of assessment set by the WA EPA under the WA EP Act was Public Environmental Review.[18]

WA accredited assessment process

26. On 30 June 2022, the WA EPA published the WA EPA Assessment Report, including recommended conditions, for a public comment period between 30 June 2022 and 21 July 2022.[19] The WA EPA Assessment Report concluded that the impacts from the proposed action on the Dampier Archipelago National Heritage place are acceptable,

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14 Reasons at [20]; Decision Brief, Document F17 (Referral) at 1–50.
15 As distinct from "*NWS Project*", which is used to refer to the project prior to the Approval Decision.
16 Decision Brief, Document F17 (Referral) at 1.
17 Reasons at [22]; Decision Brief, Document F16 (Controlled Action Decision).
18 Reasons at [22]; Decision Brief, Document F16 (Controlled Action Decision).
19 Reasons at [28]; Decision Brief, Document F10 (WA EPA Assessment Report).

provided the recommended conditions were implemented.[20] 776 appeals were lodged against the WA EPA Assessment Report.[21] On 27 September 2024, the Appeals Committee finalised its investigation and reported to the Western Australian Minister for Environment; Climate Action (**WA Minister**).[22]

27. On 26 November 2024, the WA Minister made the Appeals Determination.[23] In doing so, the WA Minister allowed the appeals in part by varying the WA EPA's proposed conditions to provide additional protection.[24]

28. On 12 December 2024, the WA Minister published Ministerial Statement 1233 (**MS 1233**) that the proposal may be implemented subject to conditions.[25]

Proposed decision communicated to Woodside and to the public

29. On 28 May 2025, the Minister informed Woodside and others that he proposed to approve the taking of the action, subject to certain proposed conditions.[26]

Consultation

30. During the period 28 May 2025 to 11 September 2025, the Department consulted Woodside about the proposed conditions of the proposed approval.

31. The Minister did not invite public comment under s 131A, reasoning that "*sufficient public consultation had occurred for the proposed action and that the views of the public were well understood*".[27]

Approval Decision

32. On 12 September 2025, the Minister approved the taking of the proposed action under ss 130(1) and 133(1) of the Act. The Minister, among other things:

    32.1 concluded that the conditions to be attached to the approval were necessary and convenient to protect the National Heritage values of the National Heritage

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20 Reasons at [29]; Decision Brief, Document F10 (WA EPA Assessment Report) at 75–76.
21 Reasons at [30]; Decision Brief, Document F11 (Appeals Committee Report), Appendix 1 at 81–88.
22 Decision Brief, Document F11.
23 Reasons at [31]; Decision Brief, Document F12.
24 Reasons at [31]; Decision Brief, Document F12 (Appeals Determination) at 1–2.
25 Reasons at [32]; Decision Brief, Document F13.
26 Reasons at [41]–[43]; Decision Brief, Documents F3–F8.
27 Reasons at [42].

place and that those conditions adequately managed the risk of significant impact to the National Heritage values of the National Heritage place;[28]

32.2 considered that the proposed action would result in significant economic benefits to the regional, State and national communities, including by reference to figures estimating the combined contribution of the proposed action and the proposed Browse development to the Australian and Western Australian economies;[29] and

32.3 considered that approving the action, subject to the recommended conditions, would not be inconsistent with the National Heritage management principles for the purposes of s 137A of the Act.[30]

Application for review

33. On 10 October 2025, FARA filed its application for judicial review of the Approval Decision.

34. On 13 March 2026, FARA amended its grounds of review.

35. Each of the grounds concerns distinct aspects of the Approval Decision. For that reason, the more detailed facts specific to each ground are set out in Woodside's response to each ground.

36. Woodside notes that it does not agree with all aspects of the factual background identified in FARA's submissions. To the extent that it is necessary to correct specific errors for the purposes of the proceeding those specific errors are addressed under each ground below.

D. GROUND ONE – SECTION 136(1)(b)

37. Ground 1 is that the Minister: (a) was required by s 136(1)(b) to consider economic matters that include adverse economic consequences that may or would arise from or be caused by the Approval Decision; and (b) failed to consider any such consequences.

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28 Reasons at [234], [298] and [311].

29 Reasons at [250(c)].

30 Reasons at [295].

FARA's submission

38. FARA contends that the Minister's consideration of "*economic matters*" had to include consideration of "*economic detriments*" because those are inherent in the principles of "*ecologically sustainable development*" (**ESD**) and because they were the subject of public comment and other "*substantial material*" before the Minister: FARA [65]–[72].

39. FARA sets out the comments and material on which it relies at paragraph 67 and Annexure A of its submissions.

Summary of Woodside's submissions in response

40. Woodside's submissions in response are, in summary, as follows:

40.1 *first*, s 136 of the Act, properly construed, leaves it to the Minister to determine the economic and social matters that require consideration in any given case;

40.2 *secondly*, FARA's Annexure A (including the matters emphasised in paragraph 67 of its submissions) fails to identify substantive material going to economic detriment;

40.3 *thirdly*, and relatedly, FARA has not established that the Minister did not take the relevant material into account; and

40.4 in the alternative, any error, which is denied, would not be material.

Statutory task under s 136

41. Section 136(1) of the Act provides:

> In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:
>
> (a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action;
>
> (b) economic and social matters.

42. While s 136(1) requires the Minister to consider two categories of matter,[31] it is for the Minister to determine the specific matters to be considered in any given case.[32] The

31 *Esposito v Commonwealth* [2015] FCAFC 160; (2015) 235 FCR 1 at [125] (Allsop CJ, Flick and Perram JJ).

32 *Blue Wedges Inc v Minister for Environment, Heritage and the Arts* [2008] FCA 399; (2008) 167 FCR 463 at [115] (North J); *Tarkine National Coalition Inc v Minister for the Environment* [2015] FCAFC 89; (2015) 233 FCR 254 (***Tarkine***) at [25] (Jessup J, Kenny and Middleton JJ agreeing); *Friends of Nyah Vinifera Park Inc v Minister for Environment and Water* [2026] FCA 584 at [97]–[98] (Horan J).

provision requires consideration of a "*broadly-expressed and incommensurable [set] of factors: ... The decision is in that sense a political one, and the power is therefore reposed in a Minister*".[33]

43. Section 136(1) identifies the broad categories of consideration to which the Minister is required to turn his or her mind and requires consideration not only of "*matters relevant*" to the applicable matters protected by Part 3 of the Act but also, in s 136(1)(b), of "*economic and social matters*".[34]

44. So long as the Minister, in making his or her approval decision, proceeds by reference to the categories in s 136(1) (the "**s 136(1) categories**"), the decision cannot be assailed on the ground that some particular matter, asserted to fall within either s 136(1)(a) or (b), had not been considered: cf. FARA [72].[35] That is, s 136(1) is not "*a means to make the Minister's choice of subject matter justiciable in a court*".[36]

45. The particular factors that must be taken into account in considering the s 136(1) matters are addressed by s 136(2),[37] most of the subsections of which refer to a concrete document or some similar existing artefact. The Minister must take into account the content of those documents or artefacts but is not obliged or entitled to undertake additional research or investigations.[38]

46. FARA's submissions run directly counter to these well-established propositions. FARA seeks to insert a specific requirement to consider particular economic detriments into s 136(1)(b), which would impose a restraint on the discretion of the Minister that is not supported by the statute.

47. FARA's submission that the requirement to take into account the principles of ESD implicitly required the Minister to take into account any material before him going to

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33 *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* [2023] FCAFC 139; (2023) 299 FCR 236 at [63] (Jackson and Kennett JJ).

34 *Tarkine* [2015] FCAFC 89; (2015) 233 FCR 254 at [25] (Jessup J, Kenny and Middleton JJ agreeing); *Friends of Nyah Vinifera Park Inc v Minister for Environment and Water* [2026] FCA 584 at [97]–[98] (Horan J).

35 *Tarkine* [2015] FCAFC 89; (2015) 233 FCR 254 at [25] (Jessup J, Kenny and Middleton JJ agreeing); *Friends of Nyah Vinifera Park Inc v Minister for Environment and Water* [2026] FCA 584 at [97]–[98] (Horan J).

36 *Tarkine* [2015] FCAFC 89; (2015) 233 FCR 254 at [45] (Jessup J, Kenny and Middleton JJ agreeing).

37 *Tarkine* [2015] FCAFC 89; (2015) 233 FCR 254 at [25] (Jessup J, Kenny and Middleton JJ agreeing); *Friends of Nyah Vinifera Park Inc v Minister for Environment and Water* [2026] FCA 584 at [97]–[98] (Horan J).

38 *Tarkine* [2015] FCAFC 89; (2015) 233 FCR 254 at [27] (Jessup J, Kenny and Middleton JJ agreeing); *Friends of Nyah Vinifera Park Inc v Minister for Environment and Water* [2026] FCA 584 at [97]–[98] (Horan J).

economic detriment finds no support in the definition of those principles in s 3A of the Act. The express inclusion of a requirement to have regard to "*minimising any significant adverse social and economic impacts, consistently with the principles of [ESD]*" in provisions with respect to the content of recovery plans (s 270), threat abatement plans (s 271) and wildlife conservation plans (s 287) does not advance FARA's case.

48. FARA's submission that the Minister is obliged to consider all public comments (FARA [72.2]) is contrary to the statutory scheme.[39] The Minister is obliged to consider any relevant public comments given "*in accordance with*" an invitation from the Minister under s 131A: s 136(2)(f). The Minister is not obliged to consider any public comment when it has not been received in accordance with an invitation under s 131A:[40] the material before the Minister on which FARA relies was not received in accordance with such an invitation.

FARA's submissions do not identify "*substantial material*" dealing with economic detriment

49. A premise of Ground 1 is that there was "*substantial material as to the economic detriments of the [NWS Project Extension]*" before the Minister, a premise not borne out by an examination of the 37 extracts collected by FARA at Annexure A to its submissions.[41]

50. Those extracts are very short, mostly limited to 1–3 dot points. Many of them do not in fact make any reference to economic detriment.[42] Some instead question the nature or extent of the economic benefit that is likely to be realised,[43] or seek to argue that any economic benefit is outweighed by environmental or other impacts.[44]

51. Those that do contain material that could be characterised as related to "*economic detriment*" only do so at a high level and make unsubstantiated references to, or allegations relating to, purported economic harm or risk.[45]

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39 Cf. FARA [84], addressed at paragraph 96 below.
40 *Esposito v Commonwealth* [2015] FCAFC 160; (2015) 235 FCR 1 at [127] (Allsop CJ, Flick and Perram JJ).
41 All of the materials extracted at FARA [67] are also contained in Annexure A.
42 See, for example, Annexure A, items 4, 15 and 37.
43 Annexure A, items 1, 2, 8, 14, 16, 17, 18, 19, 21, 22, 25 and 30.
44 Annexure A, items 31 and 32.
45 See, for example, Annexure A, items 5, 16, 20 and 29.

52. FARA's contention that there was "*substantial material as to the economic detriments of the [North West Shelf Project Extension]*" (FARA [67]) before the Minister is not established. FARA fails to prove the premise of its contention and Ground 1 should be rejected on this threshold basis.

No basis for finding that the Minister did not have regard to material before him

53. Further and in any event, the absence of express discussion of material asserting economic detriment is insufficient to support an inference that the Minister did not consider it.

54. The Decision Brief contained a range of material with content that was or could be relevant to consideration of "*economic and social matters*", including all of the materials and submissions that FARA cites as purported evidence of "*economic detriments*". The Minister said in his Reasons that he had considered "*the final approval decision brief and all its attachments*": Reasons [52]. The Minister's indication of what material he considered in making the Approval Decision should inform an assessment of what material he did, in fact, consider.[46]

55. The absence of express reference in the Reasons to "*economic detriments*" or "*adverse economic consequences*" does not provide a sufficient basis for an inference that the Minister did not consider that matter:[47] cf. FARA [68]. As stated above at paragraph 52, there was in fact very little material before the Minister which meaningfully identified purported economic detriment. Further and in any event, there is no principle of law that requires an administrative decision-maker to refer to every piece of relevant evidence in their reasons.[48] The mere fact that some material was not mentioned in the Reasons does not mean that that material was not taken into account; a failure to mention something is not the same as a failure to consider it: cf. FARA [72].[49] The failure to mention specific material or comments might be explicable by the Minister giving the material little weight.

46 *Stambe v Minister for Health* [2019] FCA 43; (2019) 270 FCR 173 at [73] (Mortimer J).

47 See *Esposito v Commonwealth* [2015] FCAFC 160; (2015) 235 FCR 1 at [128] (Allsop CJ, Flick and Perram JJ).

48 *1-800-Flowers.Com Inc v Registrar of Trade Marks* [2012] FCA 209; (2012) 201 FCR 488 at [31] (Katzmann J).

49 *1-800-Flowers.Com Inc v Registrar of Trade Marks* [2012] FCA 209; (2012) 201 FCR 488 at [31] (Katzmann J).

56. *Secondly*, to the extent that Annexure A is comprised of community submissions (36 of the 37 items in Annexure A),[50] the Minister specifically referred to community concerns raised during the assessment at Reasons [246]–[247]. Given the volume of material that was received by the Minister which is identified at Reasons [244], there could be no reasonable expectation that the Minister would specifically discuss each representation identified in each submission in the Reasons. Given also their brevity and high level nature, the extracts identified in Annexure A did not require specific reference in the Reasons. The other item is an email from FARA with a video link (item 11). Again, given the nature of the extracts and their brevity, such material does not warrant specific reference in the Reasons.

57. FARA argues that the Minister's comments at Reasons [246] cannot be taken as an indication that the Minister had regard to the relevant matters — that they are not specific enough to evidence "*consideration as required by law*": FARA [70]. However, each of the cases to which FARA refers on this point concerned an absence of reference in the reasons to a specific document, where a failure to have regard to the content of that document was a basis for invalidity.[51] Those authorities do not support a like conclusion in the present case. There was no requirement for the Minister to have regard to any of the specific documents on which FARA relies.[52]

58. *Thirdly*, the Minister also expressly referred to some of the topics dealt with in the material identified by FARA. The Reasons disclose a number of specific "*economic matters*" that the Minister considered: in particular, the contribution of the NWS Project Extension to domestic gas supplies,[53] and the potential economic benefit of the NWS Project Extension.[54] Some of the comments to which FARA refers allege that the NWS Project Extension will impact domestic gas supplies.[55] Some of the comments relate to the economic benefit to be realised by the NWS Project Extension.[56] It was for the Minister to determine the weight to be given to the materials in assessing each of these

50 Annexure A, items 1–10, 12–25 and 27–37. Item 26 is an extract of the WA Appeals Convenor Report (Decision Brief, Document F11) which summarises arguments raised by "*a number of appellants*", and therefore can be understood as material going to "*community concerns*" as well.

51 *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; (2013) 212 FCR 99 at [71]–[72]; *Minister for Home Affairs v Ogawa* [2019] FCAFC 98; (2019) 269 FCR 536 at [115]–[117] (Davies, Rangiah and Steward JJ).

52 *Tarkine* [2015] FCAFC 89; (2015) 233 FCR 254 at [27] (Jessup J, Kenny and Middleton JJ agreeing).

53 Reasons at [251].

54 Reasons at [250].

55 For examples, see Annexure A, items 6, 10 and 22.

56 For examples, see Annexure A, items 1 and 25.

matters.[57] The fact that the Minister arrived at a conclusion on a matter with which FARA disagrees does not mean that the Minister did not consider the matter at all.

59. In this respect, it is relevant that the "*mandatory consideration*" to which a decision-maker is required to have regard must be identified at the appropriate level of particularity before it can be determined whether or not the decision-maker did, in fact, consider it.[58] The level of particularity should not be dictated by the evidence (in this case, by the particular comments and submissions to which FARA refers).[59] To allege that the Minister was required to engage in his Reasons with each of the representations made on "*economic benefit*" or "*domestic gas supply*" rather than to consider the matters in a holistic way, or to expressly refer to or give greater weight to a position that emerges from the representations, is to allege that the Minister was required to consider these matters "*in a particular manner and to a particular extent*".[60] That contention should not be accepted.

Error is not material

60. If the Court were to be against Woodside in respect of all of the above submissions, Woodside submits that any error by the Minister in the form alleged by FARA would not be material, given the cursory, high level and unsubstantiated nature of the material identified in Annexure A. There is no realistic possibility that consideration of this material (if it was required to be considered and was not considered, both of which propositions are denied) could make a difference to the outcome of the Approval Decision.[61]

Conclusion on Ground 1

61. The Court should dismiss Ground 1.

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57 See *Friends of Nyah Vinifera Park Inc v Minister for Environment and Water* [2026] FCA 584 at [135], [137] and [139] (Horan J).

58 *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403; (2012) 291 ALR 314 (***Buzzacott PJ***) at [81] (Besanko J). The decision was upheld on appeal: see *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111; (2013) 215 FCR 301 (***Buzzacott FC***), but the appeal did not concern this issue.

59 *Buzzacott PJ* [2012] FCA 403; (2012) 291 ALR 314 at [81] (Besanko J). See also *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [73] (McHugh, Gummow and Hayne JJ).

60 *Buzzacott PJ* [2012] FCA 403; (2012) 291 ALR 314 at [84] (Besanko J).

61 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; (2024) 280 CLR 321 at [7] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

E. GROUND TWO – UNREASONABLENESS

62. Ground 2 is as follows:

> In considering economic matters under s 136(1)(b), the Minister made findings:
>
> a. that the "proposed action would result in significant economic benefits to the regional, State and National communities" at Statement of Reasons [250]; and
>
> b. in each of the Reasons given at Statement of Reasons [250(a)-(c)]); and
>
> c. in the final sentence of Statement of Reasons [251],
>
> which were irrational, illogical and/or unreasonable (either in isolation or in any combination) because, in making those findings, the Minister:
>
> d. took into account the purported economic benefits of a separate proposed action under the *EPBC Act* (the **Browse Development**), which is yet to be and may never be approved; and/or
>
> e. considered an irrelevant matter and/or a matter he was not required or permitted to consider being the purported economic benefits of the Browse Development; and/or
>
> f. failed to consider any adverse economic consequences that may or would arise from, or be caused by, the Decision.

FARA's submission

63. FARA contends that the Minister's finding about economic benefits and long term value of the NWS Project Extension lacked any evident or intelligible justification because:

    63.1 the Minister did not consider the material on economic detriments before him: FARA [74]–[75]; and

    63.2 the Minister impermissibly considered the economic benefits of the Browse development, which was a separate and contingent project: FARA [76].

Summary of Woodside's submissions in response

64. Woodside's submissions in response are, in summary, as follows.

65. Ground 2 comprises allegations of failure to consider/consideration of irrelevant material, with an added allegation of unreasonableness which is premised on the primary allegations being made out. The ground fails at both levels:

    65.1 there was no failure to consider economic detriment for the reasons given in respect of Ground 1;

    65.2 there was therefore no absence of evident and intelligible justification for the Minister's conclusions about economic benefit at Reasons [250];

65.3 the first step is to construe the Minister's reasons and, properly construed, the Minister did not take into account the economic benefits of the proposed Browse development in the manner contended;

65.4 even if the Minister did take into account the projected combined economic benefits that the proposals would have together, that was not proscribed by statute;

65.5 that being the case, there was no absence of evident and intelligible justification, or absence of logical basis, for the Minister to take into account the benefits of the proposed Browse development; and

65.6 further and in any event, even if the Court does not accept that conclusion, the alleged errors are not material.

No failure to consider economic detriment

66. For the reasons given in respect of Ground 1, the Minister did not fail to consider the economic detriment identified by FARA.

No legal unreasonableness in respect of economic detriment argument

67. A decision-maker's reasoning will only be irrational, illogical or unreasonable where it lacks "*an evident and intelligible justification*".[62] The test is "*necessarily stringent*".[63]

68. The Minister's reasoning in support of his conclusion of economic benefit is set out at Reasons [248]–[252] and includes that the NWS Project Extension would result in significant local employment, contribute a substantial amount to the Australian economy and Australia's gross domestic profit and play a role in domestic gas supply. That was an "*evident and intelligible justification*" for the Minister's conclusion. The failure to refer to evidence of economic detriment does not deny the evident and intelligible justification. In the end, this part of Ground 2 boils down to a restatement of Ground 1: see FARA [75].

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62 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [76] (Hayne, Kiefel and Bell JJ).

63 *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [11] (Kiefel CJ).

The Minister's reasons and the relevance of the proposed Browse development

69. The proposed NWS Project Extension will involve the transition of the NWS Facilities to facilities capable, on a commercial scale, of accepting and processing third party gas and fluids.[64] Without new gas and fluid sources, "*the existing action [at the time of the Referral]… would be expected to decline over the next 10 years*".[65]

70. The third party gas and fluids that would be processed at the Karratha Gas Plant are intended to come from a variety of sources.[66] The Browse development is one of those potential sources.[67] If approved, the Browse development would involve the development of three offshore gas fields, the installation and operation of offshore processing, storage and offtake facilities, and the connection of those facilities to the existing NWS infrastructure near the North Rankin Platform.[68] FARA's assertion that "*the Browse development is separate from, and non-essential to, the [NWS Project Extension]*" (FARA [77]) is not to the point.

71. The Minister's reasons address social and economic matters in paragraphs 237 to 252.

72. The critical part of the reasoning for immediate purposes is at paragraph 250, where the Minister says: "*I consider that <u>the proposed action</u> would result in significant economic benefits to the regional, State and National communities*" (emphasis added) and then sets out a non-exhaustive list of information to support this finding.

73. Putting aside the benefit in the form of the contribution of the proposed action to the "*likely domestic [gas] supply outcome*",[69] the information to which he referred was from two main sources.[70]

74. One was Woodside's response to a Departmental request for updated information about "*economic and social matters*" provided in January 2025.[71] At the Department's request, that information related to the processing of NWS Joint Venture resources only, and "*[did] not contemplate the additional economic benefits associated with*

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64 Reasons at [2]–[3]; Decision Brief, Documents F17 (Referral) at 1, F28 (ERD) at 15 and 21.
65 Reasons at [15]; Decision Brief, Document F17 (Referral) at 72.
66 Reasons at [19]; Decision Brief, Document F15 (Referral Decision Brief) at 5.
67 Reasons at [14]; Decision Brief, Document F15 (Referral Decision Brief) at 5.
68 Decision Brief, Document F15 (Referral Decision Brief) at 5–6.
69 Reasons at [251].
70 The Minister also had regard to information sourced from the Australian Bureau of Statistics (Reasons at [250(c)(i)]).
71 Decision Brief, Document F115. The Department identified that information about "*economic matters*" in the Decision Brief, Document F9 (Legal Considerations Report) at [210]–[212].

processing other resource owners' gas".[72] To that end, the information provided largely drew on historic and contemporaneous information.[73] The Minister referred to this historic and contemporaneous information as part of his consideration of "*economic and social matters*" at paragraphs 250(a) and 250(b) of his Reasons.

75. Woodside also explained in this document that the overall economic benefit of the NWS Facilities in the *future* would depend on arrangements for the supply of third-party gas.[74] Historic and contemporaneous sources of information were appropriate as guides, but the benefits "*[would] not be representative of future scenarios, including scenarios involving additional gas resources*".[75] Woodside drew the Minister's attention to information about a potential future scenario that was before the Minister, in the form of an economic impact assessment of the estimated combined economic contribution of the NWS Project Extension and the proposed Browse development.[76] This was the material to which the Minister referred at paragraph 250(c) of his Reasons.

76. As explained further below, the Minister evidently understood that the estimated economic benefits attributable to the combined operation of the NWS Project Extension and the proposed Browse development were not certain to materialise. In his Reasons, the Minister referred, for example, to the "*<u>potential</u> Browse to NWS development*", pursuant to which "*domestic gas volumes of more than 200TJ/d <u>could</u> be processed through [Karratha Gas Plant] infrastructure*" (emphasis added).[77] He also identified that the proposed Browse development was the subject of a separate referral under the Act.[78]

Section 136(1)(b)

77. As explained above, s 136(1)(b) requires consideration of a "*broadly expressed and incommensurable [set] of factors…*". The lack of any textual limit on the scope of "*economic and social matters*" indicates that Parliament did not constrain the Minister's discretion to assess the relevant "*economic and social matters*".

72 Decision Brief, Document F115 at 2.
73 Decision Brief, Document F115 at 2.
74 Decision Brief, Document F115 at 2.
75 Decision Brief, Document F115 at 2.
76 Decision Brief, Document F112.
77 Reasons at [251].
78 Reasons at [17]; see also [249] which stated that the Browse development was under assessment.

78. There is good reason why that is the case. The Minister's fundamental responsibility and concern under the Act is whether a proposed action should be allowed to proceed "*notwithstanding its likely significant impact upon a matter of national environmental significance protected by Pt 3*".[79] The Act is directed to the decision whether to approve "*the taking of the action*" (FARA [77] (emphasis added)) but that does not mean that the only things that might be relevant to the Minister's weighing exercise — including the assessment of whether there are "*wider considerations of economic and social benefit*"[80] that mean that the action should be allowed to proceed despite its potential impact — are matters that "*bear sufficient connection to the proposed action*" (FARA [77]) (particularly where FARA does not indicate what such a "*sufficient*" connection might be).

79. It will often be the case that "*economic and social matters*" will relate to an action, particularly one which is long term, because of a relationship with other actual or potential actions. It will therefore often be the case that "*economic and social matters*" relate to a proposed action indirectly or even intangibly.

80. It would be contrary to the "*broadly-expressed and incommensurable*" task, and the clear words of s 136(1)(b), to construe the provision in this way. Any construction to that effect would involve attributing to the legislature a requirement that the Minister take a narrow, artificial and blinkered approach to his consideration of what are relevant "*economic and social matters*". Neither of the reasons provided by FARA in support of its construction at FARA [77]–[78] (the "*separate action*" point) or at FARA [79]–[84] (the "contingency point") affect this conclusion.

The "*separate action*" point

81. FARA contends that the proposed Browse development was not part of the proposed action but part of a larger vision and that the Minister was therefore not at liberty to consider the economic benefits from that development in assessing the action before him: FARA [77]–[78].

82. Even if the Reasons are read as suggesting that the Minister did take into account the combined benefits that would flow if both the NWS Project Extension and the proposed Browse development were approved and went ahead, that was not proscribed by the

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79 *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311 at [88] (Allsop CJ).

80 *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311 at [87] (Allsop CJ).

statute: the Minister was entitled to consider that it was an "*economic matter*" within s 136(1)(b).

83. As explained at paragraphs 69–70 above, if the NWS Facilities (including the Karratha Gas Plant) are to continue to operate until around 2070 (in accordance with the Approval Decision), their operation and their contribution to the economy over that extended period will depend on processing feedstock and the operation of the facilities from which that feedstock is sourced. Given the broad discretion conferred on the Minister by s 136(1)(b) to determine the "*economic matters*" relevant to any given action, it is difficult to understand the basis for the suggestion that the Act prohibited the Minister having regard to estimates of the combined benefits that would flow if both the action and the proposed Browse development (which is one of those potential third party sources) were approved.

The "*contingency*" point

84. FARA contends that secondly and in any event, the proposed Browse development was wholly contingent and so the Minister should not have accepted that the benefits of the project would materialise: FARA [79]–[84].

85. That contention is also misconceived.

86. There is no basis on which to construe "*economic and social matters*" as requiring the Minister to only take account of matters which exist with certainty: FARA [79]–[80]. That would be to read a further limitation into s 136(1)(b) that is unsupported by its text and purpose. As explained above, s 136(1)(b) allows the Minister a wide discretion in determining the economic and social matters to which regard should be had and the way in which those matters should factor into the decision-making process. The matters the Minister considers relevant may extend from the tangible and calculable (e.g., an economic benefit assessment) to the intangible and incalculable (e.g., a policy of economic promotion).

87. Against this background, FARA does not provide any cogent reason why s 136(1)(b) must be construed in the manner it proposes, except that the proposed Browse development "*does not presently exist beyond a proposal*" and there is as yet no indication when the assessment process will be completed. As a matter of fact, that may have been correct as at the time of the Approval Decision. However, it does not bear on the construction of s 136(1)(b).

88. Section 136(1)(b) contemplates, at least in part, a forward-looking exercise in the sense that it will often be necessary to have regard to future matters, including future economic and social matters associated with a project that has not yet been approved. The same is true of the predicted environmental impacts of a proposal. As a starting point, therefore, the Minister's consideration of "*economic and social matters*" under s 136(1)(b) will often incorporate an element of uncertainty: there will always be a chance that the economic or social matters, positive or negative, to which a proponent or others advert, may not arise. This is particularly pertinent given that the Act "*may apply to very substantial developments which may be carried out over a very long period of time*".[81]

89. Additionally, to the extent that s 136(1)(b) contemplates that the Minister will have regard to at least some matters pertaining to future events (which FARA clearly accepts that it does[82]) it is significant that s 136(1)(b) does not prescribe any particular way in which the Minister is to assess such matters. If the legislature intended for the Minister to form a view about the likelihood of any forward-looking economic or social matter eventuating (and to do so to a particular threshold) it would have indicated as much.

90. Section 136(1)(b) can be distinguished in this respect from other provisions of the Act that do make such prescription. In particular, numerous provisions of the Act require the Minister to form a view about the "*impacts*" that an action "*has*" or "*will have*" or "*is likely to have*" on a matter protected by a controlling provision or on the environment generally.[83] These other provisions require the Minister to engage in a predictive exercise that requires the Minister to "*reach a state of satisfaction about the factual issue of impact*" having regard to the level of certainty required by the legislative scheme.[84] Section 136(1)(b) is not expressed in these terms. It does not require the Minister to consider "*economic and social matters*" by reference to any particular level of certainty about whether those matters will eventuate.

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81 *Buzzacott PJ* [2012] FCA 403; (2012) 291 ALR 314 at [43]. See also *Buzzacott FC* [2013] FCAFC 111; (2013) 215 FCR 301 at [224].

82 Noting that the alleged "*economic detriments*" FARA cites at [67] include, for example, "*consequences from loss of tourism and indirect economic risks and consequences from greenhouse gas emissions associated with [the NWS Project Extension]*".

83 See, in particular, ss 78(1) and 82 (definition of "*relevant impacts*").

84 *Environment Council of Central Queensland Inc v Minister for the Environment and Water* [2024] FCAFC 56; (2024) 304 FCR 91 at [130]–[132] (Mortimer CJ and Colvin J).

91. Further and in any event, as explained above at paragraph 76, the Minister evidently understood that the estimated economic benefits attributable to the combined operation of the NWS Project Extension and the proposed Browse development were not certain to materialise: cf. FARA [80].

92. That contingency is reflected throughout the relevant paragraphs of the Reasons. The Minister introduced the combined figures with the language of estimation, recording at paragraph 250(c) that the two projects together were "*estimated to*" contribute $6.6 billion annually to the Australian economy. In dealing with the proponent's domestic gas projection, the Minister was careful to record at paragraph 251 that, as part of the "*potential Browse to NWS development*", "*the proponent states that domestic gas volumes of more than 200TJ/d could be processed through [Karratha Gas Plant] infrastructure*" — reporting the proponent's position rather than adopting it as a finding. The Minister accepted at paragraph 252 the proponent's statement that, with "*NWS reserves in decline, and without long-term third-party gas supply being secured, it may not be economically viable to continue operating all domestic gas and LNG processing infrastructure at [the Karratha Gas Plant]*", a statement squarely inconsistent with reasoning that assumed the proposed Browse development approval was certain. Reading the Reasons fairly and without an eye "*keenly attuned to the perception of error*",[85] it is clear that the Minister understood that the proposed Browse development may not proceed. His conclusion as to the combined estimated contribution of the two projects should be understood in that light. There was no error.

93. It is difficult to understand what assistance is sought to be derived from FARA's references to authorities about the *Competition and Consumer Act 2010* (Cth) and the *Migration Act 1958* (Cth) (FARA [81]–[83]).

94. The test by which the effect of a merger is assessed under the *Competition and Consumer Act 2010* (Cth) asks whether the relevant acquisition "*would have the effect, or be likely to have the effect, of substantially lessening competition in any market*".[86] The authorities about the nature of that test do not assist the Court in understanding the nature of the obligation to consider "*economic and social matters*" nor the invalidity

[85] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

[86] *Competition and Consumer Act 2010* (Cth), s 50.

said to flow from the asserted failure to consider submissions going to economic detriment.

95. It is even more difficult to understand FARA's reliance on how a "*likelihood of future offending*" is ordinarily assessed for the purposes of the *Migration Act 1958* (Cth) (FARA [82]). The authorities cited by FARA concern the issue of whether the decision-maker's assessment of the likelihood of re-offending was based on probative material.

96. FARA's submission at FARA [84] (that the fact that a matter that is raised in a mandatory source of information does not make it a mandatory relevant matter to be considered) cuts across its submissions at FARA [72] (where the Minister has before him or her material which indicates economic detriments the Minister must consider that material). The true position is that s 136(1)(b) is not so prescriptive – it does no more than mandate that the Minister consider economic and social matters and otherwise leaves the form of that task to the determination of the Minister (subject to compliance with s 136(2)).

No legal unreasonableness in relation to Minister's references to the proposed Browse development

97. For the reasons set out above at paragraphs 69–70, 72–76, 81–83 and 86–96, the consideration of potential future benefits of other sources of feedstock to be processed at the Karratha Gas Plant was not in any sense illogical, let alone legally unreasonable, noting the stringent test applied to that ground of review (see paragraph 67 above).

98. The legal standard of reasonableness in any statutory context is a matter of construction, the question being "*whether the statutory power has been abused*".[87] FARA contends that the Minister was required to "*engage with the layers of contingency which attended the Browse Development*" (FARA [80]). This contention is not referable to a legal standard and it is not supported by the proper construction of s 136(1)(b).

99. For the reasons given at paragraphs 86–90 above, it would be contrary to the text and purpose of s 136(1)(b) to require the Minister to engage with the likelihood of the relevant economic and social matters eventuating with any greater specificity than he did in the Reasons. Section 136(1)(b) does not prescribe a reasoning process of that kind. In the statutory context, the Minister's acknowledgment and awareness of the fact

[87] *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [67] (Hayne, Kiefel and Bell JJ).

(as addressed at paragraphs 76 and 92 above) that the proposed Browse development might not be approved, and therefore that the combined economic contribution of the actions could be no more than a potential contribution, are sufficient to disclose an "*evident and intelligible justification*"[88] for his conclusion that the NWS Project Extension would "*result in significant economic benefits to the regional, State and National communities*".[89]

Materiality

100. The submissions above show that the Minister did not fail to consider economic detriments and that his findings on the economic benefits of the NWS Project Extension were not legally unreasonable or otherwise beyond power. The following paragraph is put as a contingent alternative. If, contrary to the foregoing submissions, the Court is against Woodside on any aspect of Ground 2, the further alternative is that any error was not material to the Minister's ultimate decision.

101. Even if the Minister did err in his consideration of the estimated combined economic contribution of the NWS Project Extension and the proposed Browse development, there is no realistic possibility that his disregard of that matter could have resulted in a different decision.[90]

102. The combined figures were just one aspect of the matters which the Minister considered in his assessment of "*economic and social matters*". And these "*economic matters*" were just some of the many factors that the Minister took into account in making his decision. Excluding the Browse-inclusive figure,[91] the NWS-only figures (A$1,788 million annually, A$40 billion in royalties over four decades, 900 employees, 280 Karratha Gas Plant employees resident in Karratha[92]) are substantial.

103. The Reasons demonstrate that the Minister was aware of and understood the fact that the proposed Browse development may not proceed. In those circumstances, it cannot be said that there is a realistic possibility that he could have made a different decision had he not taken into account the combined estimated contribution of the two actions.

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88 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [76] (Hayne, Kiefel and Bell JJ).

89 Reasons at [250].

90 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; (2024) 280 CLR 321 at [7] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

91 Reasons at [250(c)].

92 Reasons at [250(a)–(b)].

104. Similarly, even if the Minister failed to have regard to "*economic detriments*" and his conclusion as to the likely "*economic benefit*" of the action was consequently unreasonable, that error was not material to his decision either. Given the nature and extent of the information provided by Woodside as to the likely economic benefit of the action, and the vague and unsupported nature of the statements as to "*economic detriment*" on which FARA relies, there is no realistic possibility that consideration of those matters could have resulted in a different decision (see also at paragraph 60 above).

F. GROUNDS THREE, FOUR AND FIVE

105. Ground 3 is that:

> Before making the Approval Decision, the Minister was required to:
>
> a. identify the impacts of the proposed NWS Project on MNES (namely the National Heritage values of a National Heritage Place) if the proposed project was to be approved with all of the final proposed conditions; and
>
> b. assess whether those impacts were acceptable in light of the benefits that the proposed action may bring;
>
> and failed to undertake the task in paragraph (a) and/or (b).

106. Ground 4 is that:

> Before making the Approval Decision, which included attaching each of Conditions 4-8 (the Emissions Conditions) to the approval of the proposed action, the Minister:
>
> a. was required by s 134(1) to be satisfied that each of the proposed Emissions Conditions was "necessary or convenient for protecting a matter protected by a provision of Part 3 for which the approval has effect, namely, the National Heritage values of a National Heritage Place, having regard to the impacts of the proposed action on the National Heritage values of the National Heritage Place and every other final proposed condition; and
>
> b. failed to undertake that task or proceeded on a misunderstanding of the law, in relation to each of the Emissions Conditions.

107. Ground 5 is that:

> In making the Decision, the Minister imposed the Emissions Conditions by reference to whether they were feasible for Woodside to comply with, so as to ensure that their attachment would not prevent the proposed action from occurring, and thereby:
>
> a. failed to comply with the task required under s 134(1), as specified in Ground 4(a), or proceeded on a misunderstanding of the law; or
>
> b. otherwise reasoned unreasonably, irrationally or illogically.

FARA's submissions

108. As FARA acknowledges, Grounds 3, 4 and 5 are related. They are each concerned, one way or another, with what happened between the communication of the proposed approval and the Approval Decision, and in particular the changes to the conditions.

109. Very broadly speaking, it appears that:

109.1 Ground 3 is directed to the Approval Decision, the contention being that the Minister did not have the power to approve the action because of changes to the conditions after the proposed approval and the absence of an updated "*Legal Considerations Report*",[93] which, so it is argued, meant that the Minister did not "*in reality*" form the requisite state of satisfaction;

109.2 Ground 4 is directed to the decision to impose Conditions 4 to 8, the contention being that the Minister did not have the power to impose those particular conditions because of changes to those conditions after the proposed approval and the absence of an updated "*Legal Considerations Report*", which, so it is argued, meant that the Minister did not form the state of satisfaction required by s 134; and

109.3 Ground 5 is also directed to the decision to impose conditions, the contention being (in substance) that the Minister took into account an irrelevant consideration, being the "*feasibility*" of the proposed conditions.

Summary of Woodside's submissions in response

110. Each of those grounds should be dismissed for the reasons given below, which are in summary as follows:

110.1 As to Ground 3 – The power to approve under ss 130 and 133 is conditioned on the receipt of the assessment documentation. The legal considerations document on which FARA relies is not part of the assessment documentation and is not a document with statutory significance. The process envisaged by the Act includes a proposed approval followed by consultation about conditions, with the evident possibility that the conditions may change between the proposed

93 See Decision Brief, Document F9 (***Legal Considerations Report***).

approval and final approval. In any event, the absence of an updated legal considerations document did not lead the Minister into error.

110.2 As to Ground 4 – The power to attach conditions to an approval is very broad. While the Minister must form the state of satisfaction required by s 134, and do so reasonably on a correct understanding of the law, there is no basis in the Minister's reasons for the suggestion that the Minister did not in fact reach the state of satisfaction or did so on a misunderstanding of the law.

110.3 As to Ground 5 – "*Feasibility*" is not an irrelevant consideration in the exercise of power to attach conditions. In any event, FARA's factual claim that the Minister attached conditions by reference to what was "*feasible*" is apt to mislead. Regardless of whether the conditions imposed were formulated taking into account Woodside's input as to what was feasible, the Minister attached conditions having formed the state of satisfaction required by the Act.

Woodside's submissions on Ground 3

111. The power to approve in s 133(1) of the Act is conditioned on the receipt of, relevantly, the assessment documentation.[94] (Separately, as addressed above, s 136 provides for matters that must be considered in deciding whether or not to approve the taking of an action and what conditions to attach to an approval.) The Legal Considerations Report on which FARA relies is not part of the assessment documentation and does not have any status under the Act: cf. s 136(2). FARA's submissions attach to it a significance which is not supported by the statute. It was but one of the documents prepared by the Department to inform the Minister's decision-making.

112. Before the Minister decides whether or not to approve the taking of an action and what conditions (if any) to attach, he or she must inform the person proposing to take the action and the designated proponent of the decision the Minister proposes to make and any conditions the Minister proposes to attach (s 131AA(1)(a)). The Minister must also invite the person informed to give to the Minister, within 10 days, comments in writing on the proposed approval and any conditions (s 131AA(1)(b)). The Minister must take any relevant comments into account in making the final approval decision (s 131AA(6)). Moreover, s 134(4)(aa) requires the Minister to consider "*information provided by the person proposing to take the action*" when deciding whether to attach

94 Act, s 133(1).

conditions to an approval. These provisions are evidently important because the process implies the possibility that the conditions may change as a result of consultation.

113. Moreover, the absence of an updated Legal Considerations Report did not lead the Minister into any error, for the reasons explained in the following paragraphs.

114. At the time that he formed the view that he proposed to approve the action, the Minister had before him the Legal Considerations Report. The Legal Considerations Report identified and considered each of the matters to which the Minister was required by s 136 to have regard.[95] With respect to s 136(1)(a), it concluded, relevantly, that the emissions from the action were likely to have an impact on the National Heritage place by applying pressure to the rock art of Murujuga.[96] That is not surprising given that that was the premise for the action being a controlled action and requiring approval.

115. The Legal Considerations Report then addressed the issue of whether conditions could be attached to mitigate this impact. The Department did not think that it could or should attach the same conditions as those attached to MS 1233 (the Ministerial Statement published by the WA Minister). This was in part because the MS 1233 conditions relied on the outcomes of future research.[97]

116. Taking what it termed a "*precautionary approach*", the Department considered that emissions which could cause harm to rock art should "*be restricted*".[98] It proposed a condition (Proposed Condition 3) to require the approval holder to "*achieve the outcome of no emissions above the detectable limit of air emissions that impact rock art by 31 December 2030*".[99] The "*above the detectable limit*" proviso was included to make the condition achievable for the proponent, out of recognition that it was unlikely that an outcome of zero air emissions would be achievable.[100] The Department also proposed three further conditions (Proposed Conditions 4–6) directed to the management of impacts to air quality.[101] The Department ultimately expressed the view that the proposed conditions were "*necessary or convenient*" for protecting a MNES.[102]

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95 Legal Considerations Report at [54].
96 Legal Considerations Report at [154].
97 Legal Considerations Report at [176] and [185]
98 Legal Considerations Report at [191].
99 Legal Considerations Report at [189]–[192].
100 Legal Considerations Report at [192]–[193].
101 Legal Considerations Report at [193]–[196].
102 Legal Considerations Report at [201].

117. Proposed Conditions 3–6 were "*developed in the context of uncertainty regarding the details of and appropriateness of the proponent's emissions reduction approach and uncertainty in the likelihood and scale of impacts of emissions on rock art as a result of the proposed action*".[103] The only information that had been provided by Woodside that the Department took into account pursuant to s 134(4)(aa) was the Environmental Review Document prepared as part of the Western Australian approval process.[104] The Department said that it would further consider any comments provided by Woodside.[105] The Legal Considerations Report therefore contemplated the possibility that the proposed conditions might change with the provision of further information. This is precisely what occurred.

118. At the time that the Minister made the Approval Decision, the Legal Considerations Report was very far from the only material that the Minister had before him. In terms of Departmental advice, the Minister also had the Department's final decision recommendation. In its recommendation, the Department continued to refer to the conclusions in the Legal Consideration Report as to the likely impacts of the action.[106] It maintained that a precautionary conditioning approach to emissions was necessary.[107] It also maintained that the conditions attached to MS 1233 were not sufficient.[108] It then explained that, because it had developed the proposed conditions "*in the context of uncertainty regarding the details of and appropriateness of the proponent's emissions reduction approach*", it had sought and received information from the proponent.[109] It consequently recommended a conditioning strategy taking into account "*the proponent's limitations and strength of evidence per type of emission*".[110] It then explained at length the information on the basis of which each suggested final condition had been developed.[111]

119. After explaining the basis for each of the suggested final conditions, the Department concluded that the application of these new emissions reductions conditions "*means that the action will not have an unacceptable impact on the National Heritage values*

103 Reasons at [173].
104 Legal Considerations Report at [283]. See Decision Brief, Document F28 (ERD).
105 Legal Considerations Report at [285].
106 Decision Brief, Document 1 (***Final Decision Recommendation***) at [54].
107 Final Decision Recommendation at [57].
108 Final Decision Recommendation at [56].
109 Final Decision Recommendation at [65]–[66].
110 Final Decision Recommendation at [67].
111 Final Decision Recommendation at [58]–[114].

of the National Heritage Place".[112] It explained that its conditioning approach was based on the position that "*the conditions should impose the lowest volume of emissions which can feasibly be set while still allowing the action to occur and without permitting an unacceptable impact on NHP to occur*", an approach it considered was consistent with the precautionary approach.[113] There was, therefore, material before the Minister to support a conclusion that he was satisfied that the conditions were "*necessary or convenient*" for protecting, or repairing or mitigating damage to, the Dampier Archipelago (including the Burrup Peninsula) National Heritage place. Further, much of the correspondence between the proponent and the Department about the conditions was included in the Decision Brief.

120. The Minister's reasoning in relation to the change in conditions is set out at Reasons [173]–[176]. He noted that the originally proposed conditions had been "*developed in the context of uncertainty regarding the details of and appropriateness of the proponent's emissions reduction approach and uncertainty in the likelihood and scale of impacts of emissions on rock art as a result of the proposed action*".[114] He noted that further information had been received from Woodside.[115] He agreed that Proposed Condition 3 was not feasible.[116] And he noted that the Department had recommended a conditioning strategy which took into account Woodside's limitations and the strength of the evidence per type of emission.[117] He then articulated three premises on which he would impose conditions:[118]

> - gases arising from the action are likely to impact rock art,
>
> - while the precise relationship between emissions and damage is not well understood, less emissions are likely to have a lower impact on the rock art, and
>
> - the conditions should impose the lowest volume of emissions which can feasibly be set while still allowing the action to occur and without permitting an unacceptable impact on the [National Heritage place] to occur.

121. Paragraphs 177 to 228 of the Reasons set out the conditions which the Minister imposed on these bases. At Reasons [234], the Minister stated that he considered that these conditions were "*necessary and convenient to protect the National Heritage Values of the National Heritage place*". At Reasons [235], the Minister agreed, however, that

112 Final Decision Recommendation at [117].
113 Final Decision Recommendation at [68].
114 Reasons at [173].
115 Reasons at [51].
116 Reasons at [175].
117 Reasons at [175].
118 Reasons at [176].

notwithstanding the conditions, the proposed action "*is likely to result in residual impacts to the values of the Dampier Archipelago*". He then went on in the balance of his reasons to consider the acceptability of the residual impact.

122. The fact that the final conditions did not require Woodside to achieve an outcome of no emissions above the detectable limit, as originally contemplated by Proposed Condition 3, does not affect the conclusion that the Minister was satisfied that the final conditions were relevantly necessary or convenient under s 134 of the Act. At the time of the proposed approval, the Department did not have at its disposal scientific information to support the view that a zero emissions limit was necessary to prevent any damage to rock art.[119] Rather, the Department's position was that a precautionary approach required that emissions be "*restricted*". Its Proposed Condition 3 was a way that it thought that impacts to the rock art could be managed in a manner consistent with this precautionary approach, but it did not reflect a concluded view on how a precautionary approach could or should be pursued, pending input from Woodside. The Department's Final Decision Recommendation explained this process.

123. FARA relies on the fact that the Department, in its Final Decision Recommendation, described the purpose of the changes to the proposed conditions as being to "*clarify*" the conditions (FARA [6], [107]).[120] That should be understood in light of the detailed explanation of the changes to the proposed conditions actually provided in the recommendation.[121] Further, the materials before the Minister expressly addressed and drew the Minister's attention to aspects of the changes that might especially affect the Minister's reassessment. For example, the Department specifically dealt with the fact that the final conditions had the effect of imposing some of the emissions reduction obligations progressively, rather than immediately. It accepted that this meant that there is a "*higher likelihood of the action having an impact on the NHP in the short-term*" but expressed the view that "*any likely short-term impact on the NHP would be small and therefore outweighed by the social or economic factors discussed in this brief*".[122]

124. Additionally, the new material to which FARA refers at FARA [100.2] was addressed in the material before the Minister.

119 Legal Considerations Report at [191].
120 Final Decision Recommendation at [5].
121 Final Decision Recommendation at [51]–[113].
122 Final Decision Recommendation at [118].

125. The Department referred to the PhD research cited by FARA in its Final Decision Recommendation.[123] It said that this new research supported the Department's assessment that a precautionary approach offering protection beyond the conditions of MS 1233 was required.[124] The Minister also referred to the research in his Reasons, said that he had considered it, and agreed with the Department's conclusion that the inconsistency in findings between contemporary studies supported a precautionary approach.[125] The Department's assessment of this new research did not affect its conclusions as to the nature and extent of the potential impacts of the proposed action. It supported its conclusion as to the appropriate conditioning approach to be adopted. It was therefore adequately accounted for in the Final Decision Recommendation and its consideration of the final conditions.

126. The Department also referred, in its Final Decision Recommendation, to the further submissions that had been provided by FARA,[126] as the Minister did in his Reasons.[127] FARA's submission at FARA [100] essentially amounts to an allegation that the Minister was required to use these materials in a particular way to reach a particular position. However, the weight that the Minister gave to them and their role in the s 136 balancing exercise were matters for him.[128]

127. The Department did not need to provide the Minister with an "*updated equivalent analysis to that in the Legal Considerations Report*" to enable him to assess whether or not to impose the conditions (cf. FARA [106]). The Legal Considerations Report contained the Department's consideration of the s 136 matters.[129] On the basis of that consideration it had concluded: that the proposed action was likely to have certain impacts; that conditions should be attached to mitigate or limit those impacts (and, in particular, to mitigate or limit damage caused by emissions); and that a precautionary approach to conditioning in relation to emissions should be adopted, because there was no clear evidence of the emissions limits that would ensure that no damage was caused. None of that analysis had changed by the time the Minister made the Approval Decision. The additional material provided by the Department, in the form of its Final

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[123] Final Decision Recommendation at [33].
[124] Final Decision Recommendation at [55].
[125] Reasons at [49], [120], [167].
[126] Final Decision Recommendation at [34].
[127] Reasons at [48].
[128] *Friends of Nyah Vinifera Park Inc v Minister for Environment and Water* [2026] FCA 584 at [148] (Horan J).
[129] It also contained the Department's consideration of other necessary matters, such as s 137A.

Decision Recommendation, explained the basis for the imposition of each of the final conditions. There was, therefore, more than sufficient material before the Minister to allow him to form the state of satisfaction required by s 134.

Conclusion on Ground 3

128. The Court should dismiss Ground 3.

Woodside's submissions on Ground 4

129. Section 134 confers a broad power to attach conditions to the approval of an action.

129.1 Section 134(1) relates to the protection of, and repair and mitigation of damage to, MNES whether or not from the action the subject of the approval.

129.2 Section 134(2) relates to the protection of, and repair and mitigation of damage to, MNES caused by the action the subject of the approval.

130. In each case, the Minister must be satisfied that the condition is "*necessary or convenient*" to achieve the objective in question. There is "*a considerable deal of elasticity in the words 'necessary or convenient'*".[130] In the context of s 134, it has been recognised that the power to impose conditions is a "*very wide one*"[131] and the "*necessary or convenient*" test does not require the Minister to be satisfied that a condition will have any specific effect on the impacts that an action may have.[132] A condition might be imposed, for example, to manage the residual risks of an action, particularly where the precautionary principle is engaged.[133] It is relevant, in this respect, that the Act "*may apply to very substantial developments which may be carried out over a very long period of time*".[134]

131. The argument of the amicus, the United Nations Special Rapporteur on the human right to a clean, healthy and sustainable environment (***Special Rapporteur***),[135] that the power

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130 *Carbines v Powell* [1925] HCA 16; (1925) 36 CLR 88 at 96 (Rich J). See also *Palmer v Australian Electoral Commission* [2019] HCA 24; (2019) 269 CLR 196 at [65] (Gageler J).

131 *Buzzacott PJ* [2012] FCA 403; (2012) 291 ALR 314 at [58] (Besanko J). Decision upheld and reasoning not disturbed on appeal: see *Buzzacott FC* [2013] FCAFC 111; (2013) 215 FCR 301.

132 *Buzzacott PJ* [2012] FCA 403; (2012) 291 ALR 314 at [56] (Besanko J); *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts* [2009] FCAFC 114; (2009) 178 FCR 385 at [47].

133 *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts* [2009] FCAFC 114; (2009) 178 FCR 385 at [50].

134 *Buzzacott PJ* [2012] FCA 403; (2012) 291 ALR 314 at [43] (Besanko J). See also *Buzzacott FC* [2013] FCAFC 111; (2013) 215 FCR 301 at [224].

135 Pursuant to the orders of the Honourable Justice Button made 25 May 2026, the grant of leave to the Special Rapporteur is limited to UNSR [5]–[12] and [18]–[19], and UNSR [59] in respect of Grounds 3, 4 and 5. Woodside has not responded to any paragraphs outside of the grant of leave, and understands

to attach conditions "*must be given real teeth in order to give effect to Australia's obligations under law*" (UNSR [59]) mischaracterises the principle that a statute should be construed, so far as its language permits, in a manner that is consistent with Australia's international obligations (the "*presumption of consistency*").[136] The presumption only applies where the proposed construction is otherwise open on the text of the provision.[137] It is not a means by which Australia's international obligations are given effect in Australian law.[138] In any event, Woodside is not contending for a narrow view of the power – in the absence of that kind of contention, the Special Rapporteur's submission seems to lack relevance. Further, the Special Rapporteur does not make any attempt to link its submissions on intergenerational equity and the precautionary principle at UNSR [18]–[19] to the construction of s 134. In any event, what FARA challenges in Ground 4 (and Grounds 3 and 5) is the *process* that the Minister followed in attaching the conditions and the state of satisfaction that he was required by the Act to form before deciding to do so. The Special Rapporteur's submissions are not relevant to this question.

132. Section 134(3) gives examples of the kinds of conditions that may be attached to an approval, without limiting the kinds of conditions that may be attached. Those example conditions further demonstrate the breadth of the power.[139]

133. It may be accepted that, in forming the state of satisfaction in s 134(1) and (2), the Minister "*must proceed reasonably on a correct understanding and application of the applicable law*".[140] However, there is no basis in the Act to require the Minister, as a prerequisite to attaching conditions under s 134, to "*identify what the impacts of approving the taking of the action are on the protected subject matter — <u>either if the action is approved without any conditions or if the action is approved with conditions</u>*" (cf. FARA [92] (emphasis added)).

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that the balance of the submissions filed by the Special Rapporteur on 2 June 2026 are not before the Court in this proceeding.

136 See, e.g., *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* [1908] HCA 95; (1908) 6 CLR 309 at 363 (O'Connor J).

137 *Macoun v Federal Commissioner of Taxation* [2015] HCA 44; (2015) 257 CLR 519 at [67].

138 *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273 at 287–8 (Mason CJ and Deane J).

139 *Buzzacott PJ* [2012] FCA 403; (2012) 291 ALR 314 at [58] (Besanko J).

140 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) 264 CLR 123 at [34] (Kiefel CJ, Gageler and Keane JJ); *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [90] (Gageler J).

134. Here, the Minister's reasons demonstrate that he assessed whether the impacts of the proposed action were acceptable in light of the benefits that the action may bring, whether there were conditions that could mitigate those impacts and whether the residual impacts following the imposition of conditions were acceptable:[141] see paragraphs 114–127 above.

Conclusion on Ground 4

135. The Court should dismiss Ground 4.

Woodside's submissions on Ground 5

136. To a large extent, FARA fails to demonstrate error because FARA takes issue with paragraphs that do not purport to explain the basis on which the revised conditions were imposed. The paragraphs of the Reasons impugned by FARA at FARA [123] – being paragraphs 171–176 – identify the basis on which the original conditions were revised, but do not purport to identify the basis on which the revised conditions were said to be necessary or convenient.

137. To the extent that feasibility was a consideration in revising the conditions (see Reasons [191], [197], [209] and [211])[142], that was permissible, for the following reasons.

138. Whether a condition is technically achievable or workable is not irrelevant to the Minister's view as to whether it is "*necessary or convenient*" to achieve the objective in question. It is relevant, in this respect, that s 134(4)(b) of the Act provides that, in considering whether to attach a condition to an approval, the Minister must consider "*the desirability of ensuring as far as practicable that the condition is a cost-effective means for the Commonwealth and a person taking the action to achieve the object of the condition*". This provision confirms that the Minister can take into account, in deciding whether to attach conditions to an approval, matters going to the design or implementation of a condition. It would be absurd to think the Minister could consider whether a condition was cost-effective, but in considering whether it was "*necessary or convenient*," he or she must disregard the fact it is not technically achievable or workable.

141 *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* [2023] FCAFC 139; (2023) 299 FCR 236 at [64] (Jackson and Kennett JJ).

142 Also impugned by FARA: FARA [123].

139. Additionally, as discussed above, the Act expressly requires that the Minister will have regard to comments provided by the proponent about any proposed conditions (s 131AA(6)) and, more generally, to information provided by the proponent (s 134(4)(aa)). Those provisions demonstrate the intention of the legislation to involve the proponent in the development of conditions that it will be required to implement. The evidence in this case suggests at least one reason why this might be the case: that is, where the Department requires (and is aware at the time of designing the "*proposed conditions*" that it requires) further information in order to arrive at the "*final conditions*".

140. In the present case, the Minister imposed conditions that sought to account for information, which the Department did not have at the time of developing the proposed conditions, about the proponent's technical capacity to achieve the reduction of emissions to particular levels, and the relevance of each emissions type to the likely impacts of the action. This was part of a reasoning process that was supported by s 134.

141. The Minister did have regard to whether the conditions were ones with which Woodside could feasibly comply, but he did not impose the conditions because they were feasible. He attached the conditions because of their protective function. He considered that they imposed "*the lowest volume of emissions which can feasibly be set while still allowing the action to occur and without permitting an unacceptable impact on the NHP to occur*".[143] In doing so, he took into account (but did not necessarily accept) information provided by the proponent about its technical ability to reduce different types of emissions by specific amounts.[144] Such an approach was open to him under s 134.

142. To the extent that FARA alleges that the Minister imposed conditions "*by reference to whether they were feasible for Woodside to comply with <u>so as to ensure their attachment would not prevent the proposed action from occurring</u>*" (FARA [122] (emphasis added); see also [124]), that allegation is unsubstantiated and in any event beyond the scope of the application.

143. Not only did the Minister comply with the task required by s 134(1), but his reasoning was also legally reasonable. FARA, in substance, takes issue with the merits of the Minister's conclusion as to the appropriate conditions, rather than the legality of the

143 Reasons at [176].
144 Reasons at [186], [187], [191], [201]–[204],

formation of his state of satisfaction about the conditions that were imposed. To develop the precautionary approach which it assessed was necessary, the Department requested, and the Minister ultimately had regard to, information provided by the proponent about the relevance of different types of emissions to impacts on rock art and the practical limits that could be imposed on each type of emissions. Based on this information, the Minister determined that the final conditions were "*necessary and convenient to protect the relevant matter under s 134(1)*". This was not an approach that lacked "*evident and intelligible justification*".[145]

Conclusion on Ground 5

144. The Court should dismiss Ground 5.

G. GROUND SIX – PROPER CONSTRUCTION OF SECTION 137A

145. Ground 6 is expressed by FARA to be that the Approval Decision is inconsistent with the National Heritage management principles[146] contrary to s 137A(a) of the Act.

146. The only aspect of Ground 6 that arises for the purpose of the July hearing is the determination of the following question:[147]

> On the proper construction of section 137A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), is a question of whether the Minister acted inconsistently with the National Heritage Management principles a question of objective fact for the Court to determine based on the admissible evidence before the Court?

FARA's submission

147. Section 137A(a) of the Act provides that, in deciding whether or not to approve the taking of an action, the Minister "*must not act inconsistently with the National Heritage management principles*".

148. FARA contends that "*compliance with the National Heritage management principles is a matter for the Court to determine based on the admissible evidence before the Court*".[148]

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145 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [76].

146 The National Heritage management principles appear at Schedule 5B to the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth), made pursuant to s 324Y of the Act.

147 Orders of the Honourable Justice Button dated 12 March 2026.

148 Amended Originating Application filed 13 March 2026 (***Amended Originating Application***) at [6], particular (e).

Summary of Woodside's submissions in response

149. Woodside submits that the Court should answer the preliminary question "*no*", for the following reasons:

149.1 FARA's argument is inconsistent with this Court's decision in *Rainforest Reserves Australia Inc v Minister for the Environment and Water* (***Rainforest Reserves***);[149]

149.2 on its proper construction, and having regard in particular to its place in the decision-making scheme created by the Act, s 137A does not create a condition on the Minister's exercise of power pursuant to ss 130 and 133 that must be established as a matter of objective fact; and

149.3 FARA's proposed construction is fundamentally inconsistent with the nature of the task conferred on the Minister by s 137A.

150. The question of construction contained in the preliminary question raises only the "*objectivity*" element of a jurisdictional fact (cf. FARA [137]), and not the "*essentiality*" element — that is, whether "*the legislature intends that the absence or presence of the fact will invalidate action under the statute.*"[150]

The decision in *Rainforest Reserves*

151. Section 140 of the Act provides that, "*in deciding whether or not to approve ... the taking of an action relating to a listed migratory species*", the Minister "*must not act inconsistently*" with Australia's obligations under certain treaties.

152. In *Rainforest Reserves*, Shariff J considered and rejected an argument that s 140 creates a jurisdictional fact — "*that the Minister cannot (as a matter of objective fact) act 'inconsistently with' the Specified Bilateral Treaties*"[151] — the existence of which is an essential condition to the Minister's exercise of power under s 130 and s 133. His Honour considered, among other things, the text of the provision,[152] its place in the statutory scheme,[153] and the nature of the decision-making task that it creates.[154]

[149] [2025] FCA 532; (2025) 311 FCR 98.
[150] *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 at [37] (Spigelman CJ, Mason P and Meagher JA agreeing).
[151] *Rainforest Reserves* [2025] FCA 532; (2025) 311 FCR 98 at [54].
[152] *Rainforest Reserves* [2025] FCA 532; (2025) 311 FCR 98 at [82]–[83].
[153] *Rainforest Reserves* [2025] FCA 532; (2025) 311 FCR 98 at [83].
[154] *Rainforest Reserves* [2025] FCA 532; (2025) 311 FCR 98 at [84]–[85].

153. Section 140 is in the same Subdivision of the Act as s 137A. It is one of a series of provisions (ss 137–140) that specifies that the Minister, in deciding whether or not to approve the taking of an action, "*must not act inconsistently*" with certain instruments and principles. The wording of s 137A and s 140 (the Minister "*must not act inconsistently*") is relevantly the same. The same textual and contextual considerations that informed Shariff J's construction of s 140 must therefore apply with equal force to the construction of s 137A. Although *Rainforest Reserves* does not concern the provision under consideration in this case, its terms are indistinguishable. If the Court were to accept FARA's argument on this point in this matter, it must necessarily follow that the decision in *Rainforest Reserves* was wrong.

The proper construction of s 137A of the Act

154. Whether s 137A creates a precondition to the exercise of power that is to be determined as a matter of objective fact is a question of statutory construction.[155]

Text

155. Section 137A contains a negative stipulation: the Minister "*must not act inconsistently*" (with the National Heritage management principles). This is different to a requirement that the Minister "*act consistently*" with some matter. In *Friends of Leadbeater's Possums Inc v VicForests*,[156] Mortimer J, speaking about s 139 of the Act specifically, said that a statutory imperative to act "*not inconsistently with*" is intended by Parliament to be a "*softer requirement*" than an imperative to act "*in accordance with*" certain matters.[157]

156. Justice Shariff in *Rainforest Reserves* applied that reasoning to s 140 of the Act and concluded that the provision is "*consistent with a task that requires the Minister to form an opinion*", because it "*lends itself to being a matter of opinion and impression, as opposed to an objective fact*": at [84]–[85]. The same conclusion is appropriate here given the similarities between ss 137A and 140 identified in paragraph 153 above.

157. The fact that s 137A (unlike some other provisions of the Act) does not use the language of "*satisfaction*" is not determinative (cf. FARA [135]). It is well-established that the fact that a provision does not use the language of subjective consideration or

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155 *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 at [37] (Spigelman CJ, Mason P and Meagher JA agreeing).

156 [2018] FCA 178; (2018) 260 FCR 1.

157 *Friends of Leadbeater's Possums Inc v VicForests* [2018] FCA 178; (2018) 260 FCR 1 at [215].

satisfaction does not necessarily mean that Parliament intended to require that the relevant fact be objectively established.[158]

158. FARA refers to observations of Gageler J in the context of ss 198(1A) and 198AD(2) of the *Migration Act 1958* (Cth) in support of its construction: FARA [135]. Those observations were made in a different statutory context and should not be taken to affect this general position (see FARA [135]). Moreover, the language of the provisions considered by Gageler J in the case to which FARA refers is different to the language of s 137A of the Act.[159] The Migration Act provisions in question ask whether "*a person no longer needs to be in Australia*" for a specified purpose, which is much more readily capable of objective determination than a requirement that a Minister not act inconsistently with the National Heritage management principles. This is for two reasons in particular.

159. *First*, the jurisdictional precondition that FARA propounds is that "*the Minister's decision ... be actually or objectively consistent*" with the National Heritage management principles (see FARA [131]). However, s 137A does not refer to the Minister's *decision* being consistent or inconsistent with any matter.[160] It requires the Minister, in making their decision, to *act* not inconsistently with the specified matters. The jurisdictional "*fact*" for which FARA contends is not based in the text of the provision. Moreover, the more circuitous language of the provision suggests that Parliament did not intend to make the existence of a decision of a certain kind itself a precondition to the exercise of power. The focus of the provision is the conduct or process of the Minister, which is less precise and more difficult to assess as a matter of objective fact than its product.

160. *Secondly*, for the reasons identified at paragraph 155 above, s 137A contains a negative stipulation, which is a "*softer*" requirement than a provision phrased in imperative terms.

161. For the reasons set out above, the provision is not cast in "*manifestly objective terms*" (cf. FARA [135]).

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158 *Coordinated Construction Company Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229; (2005) 21 BCL 364 at [44] (Basten JA).

159 See *Plaintiff M96A/2016 v Commonwealth* [2017] HCA 16; (2017) 261 CLR 582 at [38]–[39].

160 Accordingly, the jurisdictional fact for which the applicant contended in *Rainforest Reserves* was that the Minister "*cannot act inconsistently with*" the relevant treaties. See *Rainforest Reserves* [2025] FCA 532; (2025) 311 FCR 98 at [54].

Nature of the task and statutory context

162. The nature of the task prescribed by s 137A also weighs against it being a matter susceptible of objective determination by a Court. The nature of the National Heritage management principles themselves is instructive in this respect. Those principles include the following:

> The objective in managing National Heritage places is to identify, protect, conserve, present and transmit, to all generations, their National Heritage values.
>
> …
>
> The management of National Heritage places should respect all heritage values of the place and seek to integrate, where appropriate, any Commonwealth, state, territory and local government responsibilities for those places.
>
> …
>
> The management of National Heritage places should make timely and appropriate provision for community involvement …

163. The terms in which these principles are expressed make clear that whether or not the Minister has "*acted inconsistently*" with them is not readily susceptible of objective determination. The Minister's task under s 137A(a) is evaluative and "*involves matters of opinion and degree*".[161] It requires the Minister to weigh competing factors and form opinions and value judgments on a potentially wide range of matters.[162] That is underscored by the use of language such as "*where appropriate*".

164. The open texture with which the principles are expressed reflects the open-ended terms of s 324Y(1) of the Act: "*[t]he regulations must prescribe principles for managing National Heritage Places*". Section 137A was also introduced into the Act when ss 137 to 140 – each of which requires the Minister, in making his or her decision, to "*not act inconsistently*" with a number of instruments or documents – had been in the statute for some time.[163] Section 137A was enacted in a context in which such instruments and documents had already been made, setting out broad goals and objectives for the

161 See *Murray Lower Darling Rivers Indigenous Nations v Commonwealth* [2025] FCA 1029; (2025) 312 FCR 243 at [100]–[101] (Stewart J). See also *Australian Heritage Commission v Mount Isa Mines Ltd* [1997] HCA 10; (1997) 187 CLR 297 at 301 and 304 (Dawson, Gaudron, McHugh, Gummow and Kirby JJ).

162 *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65; (2012) 202 FCR 200 at [147] (Perram J).

163 Act, ss 137 and 138–140.

protection of places and species the achievement of which was a matter on which reasonable minds might differ.[164]

165. To further illustrate the breadth of the instruments or documents with which the Minister must "*not act inconsistently*", s 137(c) provides that the Minister must "*not act inconsistently*" with a plan prepared for the management of a declared World Heritage property. One such plan identifies management objectives such as "*to give the Property a function in the life of the community*" and "*to collaboratively manage the Property's Outstanding Universal Value*".[165]

166. Moreover, s 137A applies when the Minister is deciding whether or not to approve the taking of an action. It therefore forms part of the broader deliberative task in which the Minister must engage under the Act. That task is governed generally by the considerations in Subdivision B, including s 136. The requirement that the Minister not act inconsistently with the National Heritage management principles is, in substance, a requirement that the Minister not act inconsistently with the principles while undertaking the general balancing exercise for which s 136 provides. Parliament has accordingly chosen to direct the Minister to "*act*" not inconsistently with the principles rather than to require the decision itself to "*be*" not inconsistent. Section 137A(a) is directed to the Minister's assessment of the role of the National Heritage management principles, in the context of the Minister's broader assessment of the action, rather than to some objectively ascertainable content that the decision must have with respect to the principles.

167. It would cut across the Minister's decision-making process under Division 1 of Part 9 of the Act for the Court to assess for itself whether the Minister had "*not acted inconsistently*" with the principles. This is demonstrated by the factual contentions that FARA makes in Ground 6, being that:[166]

> "The degradation of the petroglyphs from the impacts of the [NWS Project Extension] Project will impact all five National Heritage values of the Dampier Archipelago (including the Burrup Peninsula) National Heritage Place."

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164 Giunta Affidavit, Exhibit SRG-2 at 32–205 (being the "*Fitzgerald River National Park Management Plan*") and SRG-3 at 206–230 (being the "*Djoongari (Shark Bay Mouse) Recovery Plan*"). By way of example, the management goals expressed in the "*Fitzgerald River National Park Management Plan*" include to "*conserve the Park's rich… history*" and to "*foster a sense of stewardship for the Park by the community at all levels*": Giunta Affidavit, Exhibit SRG-2 at 58.

165 Giunta Affidavit, Exhibit SRG-1 at 19 (being the "*Australian Convict Sites Strategic Management Framework*").

166 Amended Originating Application at [6] particulars (c) and (d).

> "The Minister's Decision … will not protect, conserve, present and transmit the petroglyphs of the National Heritage Place to all generations."

168. Were the Court to engage with these factual contentions, it would be required to determine the impacts of the NWS Project Extension on the petroglyphs, and thereby on the National Heritage values of the National Heritage place. However, under the Act, it is for the Minister to determine the impacts of an action. When the Minister comes to make a decision whether to approve the taking of an action:

168.1 The Minister will have first assessed that the action is a "*controlled action*", which entails a decision at least that there is a real chance that the action will have "*significant impacts*" on a particular matter.[167]

168.2 There will have been an assessment of the impacts of the controlled action under Part 8 of the Act, the product of which will, in most cases, be a report that includes recommendations on: (i) whether the taking of the action should be approved under Part 9; and (ii) if approval is recommended, any conditions that should be attached.[168]

168.3 An assessment by an accredited assessment process can only be embarked upon if the Minister is satisfied that: (i) the relevant impacts of the action will be adequately assessed; and (ii) they will receive a report of the outcome that will provide enough information on the relevant impacts of the action to let them make an informed decision whether or not to approve the taking of the action.[169]

169. FARA's proposed construction of s 137A(a) would require the Court to engage in a further assessment of the impacts of the action. It would then also require the Court to assess whether these impacts are inconsistent with Objective 1 of the National Heritage management principles, which is expressed in open-ended and evaluative terms. In this respect, it would cut across the Minister's decision-making task under the statute.

170. Further, the provision forms part of Division 1 of Part 9 of Chapter 4 of the Act. Division 1 is concerned with "*Decisions on approval and conditions*". The provisions conferring power on the Minister to approve an action (ss 130 and 133) are in Subdivision A of that Division. Section 137A is, instead, in Subdivision B, which sets out the considerations to which the Minister must have regard in making that decision.

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167 See, relevantly, Act, ss 67, 67A and 15B.
168 Act, ss 93(2), 95C, 100 and 105.
169 Act, s 87(4).

This structural separation suggests that provisions of the second type were not intended to create facts susceptible of determination by a Court on an objective basis. They are facts arising in the course of the consideration by the decision-maker of the exercise of their power, not facts that are preliminary or ancillary to the exercise of the power.[170]

171. The structure of Division 1 of Part 9 — the Minister deciding under ss 130 and 133 by reference to the considerations identified in Subdivision B and constrained by s 136(5) — is incompatible with a parallel objective Court inquiry into the same subject-matter unconstrained by those same provisions, and would "*undermine the manifest intent of s 136 and Subdiv B*".[171] Section 137A is more naturally read as operating within the Minister's deliberative task than as a free-standing objective precondition.

Purpose

172. FARA's argument that the purpose of the Act "*is best given effect to through s 137A being construed objectively*" should not be accepted. FARA does not provide any reason why the objects of the Act are best achieved by construing s 137A as an objective factual precondition to the Minister's exercise of power. The Minister, who is designated by the Act as the appropriate person to assess all proposed actions that might have a significant impact on a MNES, and who will be appraised of the relevant material, is at least equally well-positioned to undertake the task. In any event, the general purpose of the legislation should not distract from the text of the provision, particularly where legislation strikes a balance between competing interests (as the Act does).[172] The text is controlling and, as explained above, it clearly indicates that the provision is not susceptible of objective determination by a Court.[173]

Extrinsic material

173. The Explanatory Memorandum confirms that the provision was not intended to introduce a requirement that the Minister not act, as a matter of objective fact,

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170 *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 at [44] (Spigelman CJ, Mason P and Meagher JA agreeing). See also *Country Carbon Pty Ltd v Clean Energy Regulator* [2018] FCA 1636; (2018) 267 FCR 126 at [165(f)] (Mortimer J); *Rainforest Reserves* [2025] FCA 532; (2025) 311 FCR 98 at [82]–[83] (Shariff J).

171 *Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1419; (2013) 218 FCR 491 at [81] (Cowdroy J), reasoning affirmed in *Harris v The Honourable Sussan Ley MP, Minister for the Environment* [2021] FCA 1621; (2021) 396 ALR 692 at [55]–[58] (Logan J).

172 See *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [5] (Gleeson CJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [51] (Hayne, Heydon, Crennan and Kiefel JJ).

173 *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [6] (Gleeson CJ).

inconsistently with the specified matters (or, on FARA's construction, that the Minister's decision not *be* inconsistent with those matters). The Explanatory Memorandum says that the provision "*requires the Minister* <u>*to take into account*</u> *the National Heritage management principles and any other agreement that exists in relation to a National Heritage place …*" (emphasis added).[174]

Conclusion on Ground 6

174. The Court should answer the question identified for consideration under this Ground "*no*". If the Court answers the preliminary question "*no*", Ground 6 must be dismissed.

H. GROUND SEVEN – CONSISTENCY WITH SECTION 137A

175. Ground 7 is that, alternatively to Ground 6, in making the Approval Decision, if the Minister was required to form a state of mind that he would not be acting inconsistently with the National Heritage management principles, he formed a state of mind that the Decision was not inconsistent with the National Heritage management principles unreasonably, irrationally and/or illogically.

FARA's submission

176. FARA contends, in the alternative to Ground 6, that if s 137A(a) instead required the Minister "*to form a state of mind that he would not be acting inconsistently with the National Heritage Management principles, he formed a state of mind that the Decision was not inconsistent with the National Heritage Management principles unreasonably, irrationally and/or illogically*".[175]

177. FARA contends that there was no rational basis for the Minister to be satisfied that the Approval Decision complied with s 137A, or alternatively the Minister reasoned unreasonably, irrationally or illogically in reaching that conclusion because:

    177.1 paragraph 294 of the Reasons, which was the "*dispositive*" paragraph on his consideration of s 137A, was identical to a paragraph in the "*outdated*" Legal Considerations Report; and

[174] Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No 1) 2002 (Cth) at 16.

[175] The second part of this ground misstates the statutory text somewhat (similarly to the matters discussed at paragraph 159 in respect of Ground 6). Section 137A requires that the Minister not act inconsistently with the National Heritage management principles, not that his or her decision not be inconsistent with those principles.

177.2 there were otherwise no documents before the Minister which identified whether and how the decision to approve the action with the final conditions was not inconsistent with s 137A: FARA [150]–[151].

Summary of Woodside's submissions in response

178. In summary, Woodside contends in response that:

178.1 in order to establish unreasonableness in reasons it is necessary to show that the reasons lack a justification for the outcome reached;

178.2 the Minister's reasons disclosed an evident and intelligible justification for his conclusion at paragraph 295 (contrary to FARA's submissions, it was [295] which was the dispositive paragraph, not [294]);

178.3 while the section of the Reasons addressed to the National Heritage management principles and management plan is succinct, that is unsurprising given that the environmental issue that was the focus of the Approval Decision was the impact of the action on the relevant National Heritage values; and

178.4 in any event, even if an error were disclosed in [294], which is denied, it was not material.

Required standard for reasons

179. Where a Court has regard to a decision-maker's reasons to determine whether the decision-maker has reasoned "*unreasonably*", the question is whether there is a lack of justification for the outcome that the decision-maker has reached,[176] such that the decision-maker can be said to have acted outside the power conferred on them by the relevant statute.[177] The obligation is not to provide reasons of a particular quality or to a particular standard. The test for unreasonableness is "*necessarily stringent*" and the circumstances in which a decision-maker can be said to have acted unreasonably are "*extremely confined*".[178]

180. Additionally, in assessing whether reasons disclose an intelligible justification for the outcome, those reasons are "*are not to be scrutinised upon over-zealous judicial review*

176 *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437 at [44].

177 *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [53] (Gageler J).

178 *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [11] (Kiefel CJ) and [52] (Gageler J).

by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed."[179]

Minister's reasons on s 137A provided evident and justified basis for conclusion

181. The Minister:

181.1 identified at Reasons [287]–[288] the content of the obligation imposed by s 137A(a) and referred to the National Heritage management principles;

181.2 noted at Reasons [292] that the air emissions from the proposed action may have impacts on the Murujuga Cultural Landscape, petroglyphs, Indigenous Heritage sites and social surrounds;

181.3 considered at Reasons [292]–[293] that the emissions from the proposed action may have impacts on the National Heritage place but that those impacts would be "*appropriately managed by the WA conditions and the conditions imposed by [his] decision*";

181.4 agreed at Reasons [294] with the Department that "*the proposed action [was] consistent with the National Heritage Management objectives since the conditions of approval for the action will be to protect the petroglyphs for future generations*"; and

181.5 concluded at Reasons [295] that approving the action, subject to the recommended conditions, would not be inconsistent with the principles. Reasons [295] was the dispositive paragraph.

182. FARA fails to explain why this reasoning process does not disclose a justification for the Minister's conclusion. It is entirely possible for the Court to "*comprehend how the decision was arrived at*".[180]

183. The fact that paragraph 294 of the Reasons was in the same form as paragraph 274 of the Department's Legal Considerations Report does not lead to an alternative conclusion. Paragraph 294 stated:

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179 *Minister for Immigration and Border Protection v Haq* [2019] FCAFC 7; (2019) 267 FCR 513 at [36] (Griffiths J, Gleeson J agreeing), citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

180 *Tsvetnenko v United States of America* [2019] FCAFC 74; (2019) 269 FCR 225 at [82].

> I agree with the department that the proposed action is consistent with the National Heritage Management objectives since the conditions of approval for the action will be to protect the petroglyphs for future generations.

184. *First*, that paragraph does not have the significance FARA seeks to ascribe to it. Reasons [294] reflected no more than agreement with a statement of the Department.[181] That agreement was independent of, and in addition to, the preceding analysis.

185. *Secondly*, this section of the Minister's reasons is not to be read in isolation. Rather, it should be read in the context of the Minister's broader consideration of the Subdivision B matters, and in particular his earlier discussion of the impacts of the action and of the conditions that he proposed to attach to the approval. As is clear from the Reasons, those matters were material to the Minister's consideration of s 137A and the National Heritage management principles. The Minister's reasons were based on the final approval decision brief,[182] which included not only the Department's Legal Considerations Report but also its final recommendation on the approval decision and the WA EPA's Assessment Report. This provided an ample basis for the analysis at Reasons [293] leading to the conclusion at Reasons [295].

Materiality

186. If the Court finds that the Minister was in error in referring to the Legal Considerations Report at Reasons [294], the Court should find that the error was not material. As stated above, Reasons [294] was independent of the analysis in Reasons [293], which provided a sufficient basis for the conclusion in Reasons [295].

Conclusion on Ground 7

187. The Court should dismiss Ground 7.

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181 *Wilderness Society (Tasmania) Inc v Minister for the Environment* [2019] FCA 1842; (2019) 275 FCR 287 at [30].

182 Reasons at [52].

I. CONCLUSION

188. The Court should dismiss FARA’s Amended Originating Application with costs.

Date: 9 June 2026

D G CLOTHIER

F I GORDON

J D WATSON

G R CLOUGH