NOTICE OF FILING

Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	9/06/2026 4:55:17 PM AEST
Date Accepted for Filing:	9/06/2026 4:55:19 PM AEST
File Number:	VID1356/2025
File Title:	AUSTRALIAN CONSERVATION FOUNDATION INC. v MINISTER FOR THE ENVIRONMENT AND WATER & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

FEDERAL COURT OF AUSTRALIA No VID1356/2025
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

AUSTRALIAN CONSERVATION FOUNDATION 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 22 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 five 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** (impermissible consideration of a particular economic matter) contends that the Approval Decision was vitiated by the reference in the reasons to the economic benefits that could accrue from another proposed action, known as the Browse to North West Shelf Development,[10] which was (and is at the date of these submissions) under assessment but yet to be approved.[11] The arguments in support of Ground 1 misconstrue the Minister's reasons and, in any event, impermissibly read limits into s 136(1)(b) 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 what those are. There is no prohibition on the Minister considering an economic matter pertaining to a proposed action that will or may accrue through the proposed action's relationship with other proposed or possible actions which themselves may be subject to a variety of federal and State approvals processes.

6. **Grounds 2** and **3** (indeterminacy and unreasonableness) contend that the proposed action could not be approved because too little was known about the source and composition of the feedstock to be processed at the Karratha Gas Plant in the future. The Minister identified the action and its potential impact with sufficient certainty, acknowledged residual uncertainty about future feedstock and attached conditions to the approval by reference to specific limits that bind the approval holder irrespective of feedstock quantity or composition. That is the regulatory architecture sanctioned in

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 **ACF**.

10 **Browse development**.

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

Lawyers for Forests (at first instance and on appeal),[12] *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities*[13] (***Buzzacott FC***) and *Ulan Coal Mines Ltd v Minister for Planning and Moolarben Coal Mines Pty Limited*[14] (***Ulan***) for managing residual scientific uncertainty on long-horizon projects. The identification and assessment of the action does not require the quantity and composition of feedstock to be determined in advance in the way ACF contends.

7. **Ground 4** ("*substantial cause*" under s 527E) is an attack on the Minister's finding, the subject of the Reconsideration Decision[15] challenged by ACF in VID1400/2025, that the physical impacts of climate change were not impacts of the proposed action. There was no occasion for the Minister to revisit the issue in connection with the Approval Decision and he did not err in not doing so. In any event, while ACF's submissions are styled as a construction argument, in an effort to capitalise on something said by the Full Court in *Environment Council of Central Queensland*,[16] they reduce to an impermissible factual attack on the Minister's reasoning. To the extent that they involve a construction argument at all, it is wrong and inconsistent with statements in *Environment Council of Central Queensland* (at first instance and on appeal).[17] It is also immaterial given the way the Minister reasoned.

8. **Ground 5** (apprehended bias) fails at the threshold because no duty of procedural fairness was owed to ACF: *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources*[18] (***Wilderness Society FC***); s 131AA(7). It fails again on the *Ebner* test, with which ACF does not properly engage, stopping at the point of what Woodside submits is a distorted narrative of events.[19] Consultation of proponents is expressly contemplated by ss 131AA and 134. Reflecting the real consideration given to this matter, the conditions ultimately attached were not the

---

12 *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCA 330; (2009) 165 LGERA 203; *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2009] FCAFC 114; (2009) 178 FCR 385.

13 [2013] FCAFC 111; (2013) 215 FCR 301.

14 [2008] NSWLEC 185; (2008) 160 LGERA 20.

15 As defined at paragraph 34 below.

16 *Environment Council of Central Queensland Inc v Minister for the Environment and Water* [2024] FCAFC 56; (2024) 304 FCR 91.

17 *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)* [2023] FCA 1208; (2023) 413 ALR 318; *Environment Council of Central Queensland v Minister for Environment and Water* [2024] FCAFC 56; (2024) 304 FCR 91.

18 *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175; (2007) 166 FCR 154 at [88] (Branson and Finn JJ).

19 *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 (***Ebner***).

conditions which Woodside had requested at the beginning of the consultation process. They were conditions which had been the subject of active and independent consideration by the Department, which the Minister considered necessary or convenient to protect the National Heritage values. Moreover, even if it could reasonably be apprehended that the Minister was supportive of the NWS Project Extension, that could not amount to apprehended bias unless the reasonable apprehension was that he might approve it without genuinely and appropriately performing the task required of him under the Act. There is no basis for such a conclusion here.

9. Woodside relies on the affidavit of Stacey Rose Giunta affirmed on 10 April 2026.[20] Woodside also relies on unredacted copies of certain materials annexed to that affidavit and to the affidavit of Inshani Sappideen Ward affirmed on 30 March 2026, produced to the parties by the Minister, which will be tendered by consent at trial.

B. LEGISLATIVE PROVISIONS

10. 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.

11. 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).

12. Within Part 3:

    12.1 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.[21]

---

20 **Giunta Affidavit**.

21 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.

12.2 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.

13. 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)).

14. 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.

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

16. 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)).

17. 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)).

18. 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)).

19. 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)).

20. 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

21. ACF has included an extensive background section in its submissions. Woodside submits that it is not necessary for the Court to have regard to the entirety of that background, nor to make findings as to the numerous unsupported factual assertions made by ACF.[22] The salient points are set out below.

Referral

22. On 22 November 2018, Woodside referred an action to the Minister under s 75 of the Act.[23] The referred action was described as follows, and is referred to in these submissions as the NWS Project Extension[24] or the "*proposed action*":[25]

> 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.

---

22 *Friends of Nyah Vinifera Park Inc v Minister for Environment and Water* [2026] FCA 584 at [117].

23 Reasons at [20]; Decision Brief, Document F17 (Referral) at 1-50.

24 As distinct from "*NWS Project*", which is used to refer to the project prior to the Approval Decision.

25 Decision Brief, Document F17 (Referral) at 1.

Controlled action decision

23. 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).[26] The relevant National Heritage place was the Dampier Archipelago (including Burrup Peninsula).

24. 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.[27]

WA accredited assessment process

25. 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.[28] The WA EPA Assessment Report concluded that the impacts from the proposed action on the Dampier Archipelago National Heritage place are acceptable, provided the recommended conditions were implemented.[29] 776 appeals were lodged against the WA EPA Assessment Report.[30] On 27 September 2024, the Appeals Committee finalised its investigation and reported to the Western Australian Minister for Environment; Climate Action (**WA Minister**).[31]

26. On 26 November 2024, the WA Minister made the Appeals Determination.[32] In doing so, the WA Minister allowed the appeals in part by varying the WA EPA's proposed conditions to provide additional protection.[33]

27. On 12 December 2024, the WA Minister published Ministerial Statement 1233 (**MS 1233**) that the proposal may be implemented subject to conditions.[34]

---

26 Reasons at [22]; Decision Brief, Document F16 (Controlled Action Decision).
27 Reasons at [22]; Decision Brief, Document F16 (Controlled Action Decision).
28 Reasons at [28]; Decision Brief, Document F10 (WA EPA Assessment Report).
29 Reasons at [29]; Decision Brief, Document F10 (WA EPA Assessment Report) at 75-76.
30 Reasons at [30]; Decision Brief, Document F11 (Appeals Committee Report), Appendix 1 at 81-88.
31 Decision Brief, Document F11.
32 Reasons at [31]; Decision Brief, Document F12.
33 Reasons at [31]; Decision Brief, Document F12 (Appeals Determination) at 1-2.
34 Reasons at [32]; Decision Brief, Document F13.

Request under s 132 of the Act and extensions of time

28. The Minister's receipt of the WA EPA Assessment Report triggered a 30 business day time period for a decision on whether to approve the taking of the action: s 130(1B)(a) of the Act.

29. On 10 August 2022, the Minister issued a request under s 132(a) of the Act for:[35]

> [t]he final Ministerial Statement that will be approved by the WA Minister for Environment, and published by the [Environmental] Protection Authority (EPA), following the completion of the appeals process for the proposed approval of the North West Shelf Project Extension (WA EPA project assessment number: 2186).

30. That request had the effect, pursuant to s 130(5), that the time would stop running until receipt of the requested information.

31. The Minister was provided with the information on or around 12 December 2024, when MS 1233 was published.

32. The Minister then issued three further extensions to the timeframe for the decision, on 13 December 2024, 18 February 2025 and 24 March 2025.[36]

Reconsideration request and decision

33. On 8 July 2022, Environmental Justice Australia (**EJA**) (on behalf of its client Environment Council of Central Queensland Inc. (**ECCQ**)) submitted a reconsideration request under s 78A(1) in respect of the Minister's delegate's controlled action decision of 3 May 2019, on the basis of the availability of substantial new information relating to climate change (**Reconsideration Request**).[37]

34. On 20 May 2025, the Minister determined that the proposed action was not a substantial cause of the stated physical effects of climate change on MNES and confirmed the Controlled Action Decision (**Reconsideration Decision**).[38] The Reconsideration Decision is the subject of the challenge in VID1400/2025.

---

35 Decision Brief, Document F108 at 1.

36 Decision Brief, Documents F109 (Extension to 28 February 2025), F110 (Extension to 31 March 2025), F111 (Extension to 31 May 2025).

37 Reasons at [34]; Decision Brief, Document F99.

38 Reasons at [35]; Decision Brief, Document H.

Proposed decision communicated to Woodside and to the public

35. 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.[39]

Consultation

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

37. 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*".[40]

Approval Decision

38. 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's reasons, among other things:

    38.1 acknowledged that the proposed action may involve changes to feed gas composition and composition of environmental discharges and emissions as third party gas and fluids may differ from existing NWS Joint Venture fields, and that the new emissions profile had not undergone environmental assessment;[41]

    38.2 noted that, for the same reasons given in relation to the Reconsideration Request, he did not consider that the physical impacts of climate change were impacts of the action within the meaning of "*impact*" in s 527E;[42] and

    38.3 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.[43]

---

39 Reasons at [41]-[43]; Decision Brief, Documents F3-F8.
40 Reasons at [42].
41 Reasons at [9], [106].
42 Reasons at [80], see also [33]-[40].
43 Reasons at [250(c)].

Reconsideration Decision reasons

39. On 29 September 2025, the Minister provided reasons for the Reconsideration Decision.[44]

Application for review

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

41. On 26 February 2026 and 27 March 2026, ACF amended its grounds of review.

42. 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.

D. GROUND ONE – SCOPE OF SECTION 136(1)(b)

43. Ground 1 alleges that, in making the Approval Decision, contrary to s 136(5) of the Act, the Minister considered a matter that the Minister was not required or permitted by Division 1 of Part 9 of the Act to consider, namely the economic benefits of the proposed Browse development.

ACF's submissions

44. ACF argues that it was impermissible for the Minister to have regard to the estimated combined economic contribution of the NWS Project Extension and the Browse development, relying (in broad terms) on the following propositions:

    44.1 by considering the estimated combined contribution of the two projects, the Minister had regard to the potential economic contribution of a separate action, and this is not permitted by the Act (the **separate action point**); and

    44.2 the Browse development had not yet been approved,[45] and the Minister was not permitted to have regard to matters that were "*purely hypothetical or contingent*" (the **contingency point**).

[44] Affidavit of Cecile Elizabeth Bester affirmed on 10 October 2025 (***October Bester Affidavit***), Exhibit CB-5 (***Reconsideration Reasons***).

[45] That remains the case.

Summary of Woodside's submissions in response

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

45.1 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.

45.2 *Secondly*, even if he did take into account the projected combined economic benefits that the proposals would have together, that was not proscribed by the statute.

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

46. 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.[46] 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*".[47]

47. The third party gas and fluids that would be processed at the Karratha Gas Plant are intended to come from a variety of sources.[48] The Browse development is one of those potential sources.[49] 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.[50] Although it may be contingent, the Browse development is not "*purely hypothetical*". It is a proposed action for which approval has been sought under the Act.

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

49. 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.

46 Reasons at [2]-[3]; Decision Brief, Documents F17 (Referral) at 1, F28 (ERD) at 15 and 21.
47 Reasons at [15]; Decision Brief, Document F17 (Referral) at 72.
48 Reasons at [19]; Decision Brief, Document F15 (Referral Decision Brief) at 5.
49 Reasons at [14]; Decision Brief, Document F15 (Referral Decision Brief) at 5.
50 Decision Brief, Document F15 (Referral Decision Brief) at 5-6.

50. Putting aside the benefit in the form of the contribution of the proposed action to the "*likely domestic [gas] supply outcome*",[51] the information to which he referred was from two main sources.[52]

51. One was Woodside's response to a Departmental request for updated information about "*economic and social matters*" provided in January 2025.[53] 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 processing other resource owners' gas*".[54] To that end, the information provided largely drew on historic and contemporaneous information.[55] 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.

52. 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.[56] 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*".[57] 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.[58] This was the material to which the Minister referred at paragraph 250(c) of his Reasons.

53. The Minister did not reason as if approval of the proposed Browse development was a *fait accompli* (cf. ACF [191]). 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*

---

51 Reasons at [251].

52 The Minister also had regard to information sourced from the Australian Bureau of Statistics (Reasons at [250(c)(i)]).

53 Decision Brief, Document F115. The Department identified that information about "*economic matters*" in the Decision Brief, Document F9 (Legal Considerations Report) at [210]-[212].

54 Decision Brief, Document F115 at 2.

55 Decision Brief, Document F115 at 2.

56 Decision Brief, Document F115 at 2.

57 Decision Brief, Document F115 at 2.

58 Decision Brief, Document F112.

200TJ/d could be processed through [Karratha Gas Plant] infrastructure" (emphasis added).[59] He also identified that the proposed Browse development was the subject of a separate referral under the Act.[60]

Section 136(1)(b)

54. Section 136 is in Subdivision B of Division 1 of Part 9 of the Act. Division 1 is concerned with "*Decisions on approvals and conditions*". Subdivision B sets out the "*Considerations for approvals and conditions*". Section 136(1) provides that:

> 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.

55. While s 136(1) requires the Minister to consider two categories of matter,[61] it is for the Minister to determine the specific matters to be considered in any given case.[62] The 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*".[63] 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*".

56. 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*".[64] The Act is "*action-driven*" (see ACF [186]) in the sense that its processes are concerned with the assessment of a particular "*action*", but that does not mean that the only things that might be relevant to the Minister's weighing

---

59 Reasons at [251].

60 Reasons at [17]; see also [249] which stated that the Browse development was under assessment.

61 *Tarkine National Coalition Inc v Minister for the Environment* [2015] FCAFC 89; (2015) 233 FCR 254 at [25] (Jessup J, Kenny and Middleton JJ agreeing).

62 *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 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).

63 *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).

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

exercise — including the assessment of whether there are "*wider considerations of economic and social benefit*"[65] that mean that the action should be allowed to proceed despite its potential impact — are "*facts, events, or circumstances pertaining [only] to the action the subject of the Approval Decision, and not pertaining to a separate action*" (cf. ACF [186]).

57. 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.

58. It would be contrary to the "*broadly-expressed and incommensurable*" task, and the clear words of s 136(1)(b), to construe the provision to mean that the Minister must exclude from their consideration of "*economic and social matters*" the potential economic output of other proposed or possible actions, either because they are contingent or because they are the subject of their own referral processes. 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 or her consideration of what are relevant "*economic and social matters*". Moreover, whilst in this case ACF's focus is on the Minister's consideration of economic benefits, such an approach would equally preclude the Minister considering a variety of matters that might be assessed to be relevant economic or social detriments.

59. ACF's reliance on the words "*social and economic benefits of the proposed action*" at ACF [186] comes from a passage at *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* (***Gelorup***)[66] which is in the joint judgment's discussion of the precautionary principle.[67] That phrasing is descriptive shorthand for the weighing exercise at issue in that case. It does not address, let alone decide, the construction of s 136(1)(b) which is pressed by ACF.

60. Neither of the reasons provided by ACF in support of its construction affect this conclusion.

65 *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311 at [87] (Allsop CJ).
66 [2023] FCAFC 139; (2023) 299 FCR 236 at [93] (Jackson and Kennett JJ).
67 See *Gelorup* [2023] FCAFC 139; (2023) 299 FCR 236 at [85]-[93] (Jackson and Kennett JJ).

The "*separate action*" point

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

62. As explained at paragraphs 46 and 47 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.

63. ACF contends at ACF [186] that the "*economic and social matters*" must "*pertain to the action*". If by that it is meant they must be related, relevant to or associated with the action in some way then the proposition is probably uncontroversial. But ACF goes further and contends it must "*not pertain to a separate action*". In this way ACF contends for an implied exception to the general language of s 136(1)(b), namely that, even if a matter pertains to the action it must be disregarded if it also pertains to a separate action. There is no basis for such a construction in the text of s 136(1)(b). And as explained at paragraph 58 above, it would lead to artificial outcomes. Moreover, at least in this passage, ACF contends for an implied exception irrespective of whether the separate action requires approval, has been approved or is awaiting approval. Given the breadth of the definition of action in s 523, which effectively includes any activity, the result would be the exclusion of many matters merely because they also relate to another activity.

64. ACF contends at ACF [190] that, absent a prohibition on taking into account the economic benefits of any other proposed action undergoing assessment, the s 136(1) balancing exercise would be unevenly weighted: the Minister could aggregate the

economic benefits of separate actions under s 136(1)(b) while environmental impacts could only be those of the action; that this gives economic considerations greater weight in the balance; and that it would encourage proponents to "*gerrymander*" related referrals to harvest the same economic benefit across multiple approvals. These submissions overstate the position and, in any event, are not directed towards explaining how ACF's suggested exception fits into the statutory text.

65. As explained in paragraphs 54 to 58 above, the text of s 136(1)(b) is designedly broad; it is relevantly different to the provisions requiring consideration or assessment of the impacts that an action will or is likely to have. There is <u>nothing</u> in the text of s 136(1)(b) that supports the applicant's contentions. Indeed, ACF's submission at [189] is not based on any suggested construction of the Act or any consideration of authorities, but by reference to a supposed (but unexplained) tension between:

    65.1 the concern expressed in the Department's advice to differentiate the impact of the proposed action on the rock art from the impact of total industry emissions in the imposition of conditions;[68] and

    65.2 having regard to the combined benefits information.

66. Ultimately, it is for the Minister to engage in the balancing exercise required by s 136(1) and, in doing so, it is for the Minister to decide the "*economic and social matters*" they consider relevant and give them such weight as they consider appropriate. The plain meaning of s 136(1)(b) does not lead to economic considerations being given "*greater weight*", lead to a "*slanted approach*" or "*tip the scales*" in favour of economic benefits.[69]

67. As to the "*gerrymandering*" remark, the Act contains a mechanism to ensure that the environmental impacts of an action that is a component part of a "*larger action*" are properly assessed. The proponent's ability to "*frame its own action upon referral*" is not at large (cf. ACF [187]). Section 74A provides, relevantly, that:

> If the Minister receives a referral in relation to a proposal to take an action by a person, and the Minister is satisfied that the action that is the subject of the referral is a component part of a larger action the person proposes to take, the Minister may decide not to accept the referral.

---

68 Decision Brief, Document F9 (Legal Considerations Report) at [176].

69 Once again here, ACF is focussed on its contentions in this case and ignores that "*economic and social matters*" may include detriments.

68. Section 74A confers a discretion, but, depending on the facts and circumstances of the case, the Minister may have a duty to consider its application.[70] If there is a "*real, not fanciful*" question of whether the referred action forms part of a larger action, s 74A requires the Minister to turn their mind to whether that is in fact the case, and, if so, whether the Minister should decide not to accept the referral — to avoid, among other things, the Minister "*failing to appreciate the true level of impact of an action*".[71]

69. The Minister's delegate considered the application of s 74A in this case. This was done at the time of the Controlled Action Decision, and by reference, among other things, to a policy statement on the application of s 74A.[72] That policy statement says that, in deciding whether or not to accept the referral of an action that is part of a "*larger action*", the key question for the Minister is whether the splitting of the project reduces the ability to achieve the objects of the Act.[73] A "*critical consideration*" is whether acceptance of the split referral might prevent sufficient assessment of the impacts of a larger action.[74] The Minister's delegate was satisfied that the NWS Project Extension was part of a "*larger action*", which included the proposed Browse development. Nonetheless, the delegate decided not to exercise discretion pursuant to s 74A to refuse to accept the referral.[75] That decision was not challenged.

The "*contingency*" point

70. There is no basis on which to construe "*economic and social matters*" to mean only matters "*that exist or will probably exist*" (cf. ACF [191]). 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

---

70 *Wilderness Society (Tasmania) Inc v Minister for the Environment* [2019] FCA 1842; (2019) 275 FCR 287 at [163] (Mortimer J).

71 *Wilderness Society (Tasmania) Inc v Minister for the Environment* [2019] FCA 1842; (2019) 275 FCR 287 at [171] (Mortimer J).

72 Decision Brief, Document F17 (Referral) at 379.

73 Decision Brief, Document F17 (Referral) at 383.

74 Decision Brief, Document F17 (Referral) at 383.

75 Reconsideration Reasons at [8]. See also Decision Brief, Document F15 (Referral Decision Brief) at 5-7.

benefit assessment) to the intangible and incalculable (e.g., a policy of economic promotion).

71. Against this background, ACF does not provide any cogent reason why s 136(1)(b) must be construed in the manner it proposes, except in order to accommodate its complaint that, at the time of the Approval Decision, the economic benefits of the proposed Browse development were not certain. As a matter of fact, that is correct. However, it does not bear on the construction of s 136(1)(b).

72. 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*".[76]

73. 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 ACF clearly accepts that it does[77]) 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.

74. 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.[78] These other provisions require the Minister to engage in a predictive exercise that requires the Minister to "*reach a state of satisfaction about the*

---

76 *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403; (2012) 291 ALR 314 at [43].

77 See, for example, ACF [191] and the submission that: ""*economic and social matters" must be read to mean matters that exist <u>or will probably exist</u>*" (emphasis added).

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

factual issue of impact", having regard to the level of certainty required by the legislative scheme.[79] 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. It is in fact ACF's contention in this regard that would result in an imbalance of the kind it states in ACF [190]. That would occur if, as contended by ACF, "*economic and social*" matters were to be considered by reference to a standard of probability, in circumstances where environmental impacts must be considered by reference to a standard of likelihood (in the sense of real possibility).

75. Lastly, as explained above at paragraph 53, the Minister did not reason as if approval of the proposed Browse development was a *fait accompli* (cf. ACF [191]).

76. 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*",[80] 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.

79 *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).

80 *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).

Materiality

77. Even if the Minister was not permitted to have regard to the estimated combined economic contribution of the NWS Project Extension and the proposed Browse development, and even if he did so, there is no realistic possibility that consideration of those matters could have resulted in a different decision.[81]

78. 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,[82] 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[83]) are substantial.

79. As explained above, 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.

Conclusion on Ground 1

80. Ground 1 should be dismissed.

E. GROUNDS TWO AND THREE – FAILURE TO DETERMINE KEY ASPECT OF ACTION, AND LEGAL UNREASONABLENESS

81. Ground 2 is that:

> The Approval Decision was not authorised pursuant to ss 130(1), 133 and 134 of the [Act], being the Minister's powers to approve the NWS Project Extension with conditions, because the Approval Decision impermissibly leaves undetermined the substance of a critical aspect of the action that affects the impact of it, namely the composition of third-party feed gas and resulting air emissions.

82. Ground 3 is that:

> The Approval Decision was legally unreasonable, in that the Minister had no rational basis for being satisfied that the conditions of approval, in their totality, would make

81 *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).

82 Reasons at [250(c)].

83 Reasons at [250(a)]-[250(b)].

the impacts of the NWS Project Extension on the national heritage values of the Dampier Archipelago acceptable, in circumstances where:

a. the composition of emission types that are to be expected and to be processed from third party sources are unknown; and

b. the approval has effect until 31 December 2070.

ACF's submissions

83. ACF advances two propositions in support of these grounds (ACF [193]-[206]).

84. *First*, ACF contends that, because the quantity and composition of future third party feed gas was unknown, the proposed action was "*fatally indeterminate*" and incapable of rational assessment: ACF [196]-[202].

85. *Secondly*, ACF contends that, without knowing the future feedstock, the Minister could not rationally ascertain the economic benefits of the proposed action and therefore could not lawfully undertake the s 136(1) weighing exercise: ACF [203]-[206].

Summary of Woodside's submissions in response

86. Both grounds fail at the level of legal principle, and fail again on the facts.

87. An "*action*" need not be defined with the level of granularity which ACF suggests. Conditions under s 134 are a mechanism by which the Minister may respond to residual uncertainty. Section 136(1)(b) does not demand arithmetic precision about future economic benefits.[84]

88. They fail on the facts because the Minister identified the impact pathway (industrial emissions on rock art) with sufficient certainty and attached specific conditions that bind the proponent and achieve their purpose irrespective of feedstock composition. If the proponent cannot process feedstock without breaching the conditions, that feedstock cannot be processed.

89. Each ground is addressed below. Ground 3, properly understood, is parasitic on Ground 2 and fails with it as well as on its own.

Relevant principles

90. The starting point is the breadth of the powers in ss 133 and 134.

---

84 *Gelorup* [2023] FCAFC 139; (2023) 299 FCR 236 at [58] (Jackson and Kennett JJ), citing *Triabunna Investments Pty Ltd v Minister for Environment and Energy* [2019] FCAFC 60; (2019) 270 FCR 267 at [43] (Flick J).

91. Section 133(1) permits the Minister to "*approve for the purposes of a controlling provision the taking of the action by a person*". The term "*action*" is defined at a high level of generality in s 523 to include a "*project*", "*development*", "*undertaking*", "*activity or series of activities*", and any "*alteration*" of them. Section 134(1), broadly speaking, permits the Minister to attach conditions if satisfied that they are "*necessary or convenient*" for protecting, or for repairing or mitigating damage to, a matter protected by Part 3.

92. Two propositions emerge from the authorities on those provisions.

93. *First*, the Act does not require certainty about the precise environmental consequences of an action before approval may be granted on conditions.

94. *Secondly*, large, long-term and complex projects necessarily involve elements that fall to be worked out within the life of the approval. The power to attach conditions is a way in which the scheme accommodates that.

95. *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts*[85] (***Lawyers for Forests PJ***) illustrates both propositions. In that case, the Minister had approved a pulp mill subject to conditions requiring further scientific testing and modelling of proposed effluent discharge into the Bass Strait. The applicant contended that, because the Minister was not certain of the impact of the discharge, the conditions could not lawfully be imposed. Justice Tracey rejected that contention. Section 134, his Honour held, does not require the Minister to be certain of the impact of the action; the precautionary principle expressly contemplates that measures may be taken in the absence of full scientific certainty. It was enough that the Minister had a rational basis for concluding that the impact could be prevented or mitigated by conditions imposing limits on the concentration and volume of toxic materials discharged. The Full Court of the Federal Court agreed: *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts*[86] (***Lawyers for Forests FC***).

96. The Full Court of the Federal Court endorsed that approach in *Buzzacott FC*[87] upholding s 134 conditions that required the development and approval of a "*mine closure plan*" the content of which could not be specified at the date of approval.

85 [2009] FCA 330; (2009) 165 LGERA 203.
86 [2009] FCAFC 114; (2009) 178 FCR 385.
87 *Buzzacott FC* [2013] FCAFC 111; (2013) 215 FCR 301 at [224].

Conditions of that kind, the Court observed, reflected the size and complexity of the approved activity.[88]

97. In *Ulan*,[89] Preston CJ upheld a condition (imposed under relevantly similar planning legislation) requiring a proponent to "*ensure that it has sufficient water for all stages of the project, and if necessary, adjust the scale of mining operations to match its water supply*". The "*retention of practical flexibility, leaving matters of detail for later determination*", his Honour explained, "*may all be desirable and be in accordance with the statutory scheme*".[90] The "*scale of [such] projects ... often complex, extensive and multi-stage projects, make the retention of such flexibility appropriate and inevitable*".[91]

98. The Full Court of the Federal Court in *Gelorup*[92] confirmed that "*the scheme of the [Act] permits flexibility, including modification of a proposed action between referral and approva*l".[93] The "*proposed action must nevertheless have some degree of stability*", at the time of approval, and the action must be "*identifiable because its boundaries are the boundaries of an exemption from one or more statutory prohibitions in Part 3*".[94]

Ground 2: the action was not "fatally indeterminate"

99. ACF's contention at ACF [197]-[199] is that, because the quantity and composition of future gas and fluids was unknown, the action was "*fatally indeterminate*" and "*almost wholly undefined*". The contention exaggerates both what was unknown and what the Act requires.

100. *First*, the proposed action was identified with sufficient certainty. The action approved by the Minister was, in terms, the continuation and extension of "*the operating life of the North West Shelf (NWS) Project through the long-term processing of third-party gas and fluids and NWS Joint Venture field resources through the NWS Project*

---

88 *Buzzacott FC* [2013] FCAFC 111; (2013) 215 FCR 301 at [224].
89 [2008] NSWLEC 185; (2008) 160 LGERA 20.
90 *Ulan* [2008] NSWLEC 185; (2008) 160 LGERA 20 at [78].
91 *Ulan* [2008] NSWLEC 185; (2008) 160 LGERA 20 at [80].
92 [2023] FCAFC 139; (2023) 299 FCR 236.
93 *Gelorup* [2023] FCAFC 139; (2023) 299 FCR 236 at [58] (Jackson and Kennett JJ), citing *Triabunna Investments Pty Ltd v Minister for Environment and Energy* [2019] FCAFC 60; (2019) 270 FCR 267 at [43] (Flick J) and [191]-[193] (Mortimer J). See also *Gelorup* [2023] FCAFC 139; (2023) 299 FCR 236 at [123] (Feutrill J).
94 *Gelorup* [2023] FCAFC 139; (2023) 299 FCR 236 at [58].

facilities" at the Karratha Gas Plant, until about 2070.[95] That description (which would have been read with the much more detailed information in the referral and other documentation) identifies the proponent, the existing processing facility, the activities to be undertaken (processing of gas and fluids), the feedstock (NWS Joint Venture resources and third party resources), the controlling provisions and the temporal scope. The boundaries of the action, in the sense required by *Gelorup* at [58], are clear: emissions from the Karratha Gas Plant, of identified compounds, into a defined airshed, over a defined period. The Act does not demand finely-grained specification for projects of this scale and duration.[96] As to the *quantity* of feedstock, the Minister was aware that the annual LNG production capacity of the Karratha Gas Plant is 18.5 Mtpa.[97]

101. *Secondly*, the Minister identified the impact pathway with sufficient certainty. The relevant impacts were the impacts of industrial emissions from the Karratha Gas Plant on the rock art of the Dampier Archipelago National Heritage place. The Minister made specific findings about that pathway. He accepted that there were "*multiple lines of scientific and other evidence suggesting that nitrogen oxides (NOx), sulphur oxides (SOx), and other acidic airborne emissions are having a significant adverse impact on the rocks of Murujuga*".[98] He found "*sufficient scientific evidence to conclude that areas of the Burrup Peninsula have been exposed to industrial emissions capable of accelerating rock art weathering*".[99] He made specific findings about the duration, geographic extent and heritage values affected.[100]

102. *Thirdly*, the Minister acknowledged the residual uncertainty about feedstock composition. That uncertainty was not of the magnitude suggested by ACF. The documents before the Minister identified that intrinsic design limits meant "*that any third party gas or fluids must be within the specification that can be processed within the facility design envelope, limiting third party gas/fluids to that which is similar in nature to the North West Shelf gas reserves that [Karratha Gas Plant] has been*

95 Decision Brief, Document A; October Bester Affidavit, Exhibit CB-1 at 1.
96 *Gelorup* [2023] FCAFC 139; (2023) 299 FCR 236 at [58]; *Triabunna Investments Pty Ltd v Minister for Environment and Energy* [2019] FCAFC 60; (2019) 270 FCR 267 at [43] (Flick J).
97 For example, see Decision Brief, Document F25 (ESD) at 10; Decision Brief, Document F28 (ERD) at 23; Decision Brief, Document F10 (WA EPA Assessment Report) at 15; Decision Brief, Document F13 (MS 1233) at 2; Decision Brief, Document C5 (Information from Woodside) at 4.
98 Reasons at [102].
99 Reasons at [104].
100 Reasons at [131]-[132].

designed to process".[101] The Minister's observation that Woodside's Environmental Review Document (***ERD***) "*provides limited information on the total emissions quantity and quality for the proposed action*" and that "*the degree of emissions similarity or difference is unknown for third party gas providers*"[102] must be read in that context. That acknowledgment was not a concession that the action was indeterminate.

103. In any event, and in the context of the uncertainty identified in his Reasons, the Minister attached conditions that required compliance with condition 3 of MS 1233 (Condition 4) and that limited emissions at the stacks (Conditions 5 to 8).[103] Conditions 5 to 8 impose caps on NOx, SO_2, VOCs, CO, CO_2, CH_4 and particulate matter, expressed as concentration and tonnage limits. Those caps apply to the proposed action irrespective of feedstock source or composition. If processing future third party feedstock would produce emissions that exceed those caps, that processing cannot lawfully proceed.

104. That is not legal indeterminacy. On the contrary, it is an approach that reflects the regulatory architecture explained in *Lawyers for Forests* (at first instance and on appeal), *Buzzacott FC* and *Ulan*: where some uncertainty about the precise environmental consequences of an action cannot be eliminated at the approval stage, it can be managed by conditions. The boundaries of the exemption from the Part 3 prohibitions remain clear.[104]

105. The use of conditions in this way does not "*collapse the distinction*" between an "*action*" and "*conditions*" (cf. ACF [201]). The distinction ACF invokes is observed: the "*action*" remains the long-term processing of feedstock at the Karratha Gas Plant (including as a tolling facility); the conditions are the safeguards on which the approval is granted.

Ground 3: legal unreasonableness

106. Ground 3 contends that the Minister had "*no rational basis*" for being satisfied that the conditions would make the impacts of the NWS Project Extension acceptable. The

---

101 Decision Brief, Document F59 at 16.
102 Reasons at [106]. See Decision Brief, Document F28 (ERD).
103 Reasons at [178]-[181], [272]-[274], [301].
104 *Gelorup* [2023] FCAFC 139; (2023) 299 FCR 236 at [58].

threshold for legal unreasonableness is high. The test is whether the decision lacks "*an evident and intelligible justification*".[105]

107. The Minister's reasoning on the justification of the conditions is set out at Reasons [173]-[176]. He noted that the conditions 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*".[106] He then articulated three premises:[107]

> - 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.

108. That is a coherent and intelligible chain of reasoning. The Minister identified the impact pathway, identified the means of conditioning the impact, identified the level at which the conditions should be set and explained the basis on which they were chosen. ACF cannot point to a step in the reasoning that lacks an evident or intelligible justification. Its complaints amount to an impermissible attack on the merits of the decision.

The economic-benefits limb of Ground 3 (ACF [203]-[206])

109. At ACF [203]-[206], ACF advances a separate contention: that the Minister could not rationally assess the economic benefits of the proposed action without knowing the future feedstock. That contention is premised on an unsupported proposition about the significance (for the Minister's assessment of economic matters) of the uncertainty that existed about the composition of future feedstock.

110. The sources of information relied on by the Minister are discussed in paragraphs 50 to 52 above. There is no basis in the materials for the argument that it was irrational to rely on that material as indicative of future economic benefit.

111. Even if some uncertainty attached to the economic benefits, by reason of uncertainty relating to the composition or quantity of future feedstock, that does not vitiate the weighing exercise under s 136(1). It is the nature of long-horizon projects that future

---

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

106 Reasons at [173].

107 Reasons at [176].

economic benefits cannot be specified with arithmetical precision. The Act does not require such precision. It requires the Minister to consider "*economic and social matters*", a task the Minister discharged on the materials before him. As Mortimer J observed in *Triabunna Investments Pty Ltd v Minister for Environment and Energy*[108] the scheme accommodates some scope for judgment in how a proposed action is identified, and a Minister is not disabled from approving an action because some features will resolve over time.

Conclusion on Grounds 2 and 3

112. Grounds 2 and 3 should be rejected.

F. GROUND FOUR – SECTION 527E AND "SUBSTANTIAL CAUSE"

113. Ground 4 is that the "*[t]he Minister erred in failing to take into account information he had about the physical effects of climate change on the national heritage values of the Dampier Archipelago*". The argument is that the Minister misconstrued s 527E when he found that the projected future impacts of climate change were not impacts of the NWS Project Extension.

ACF's submissions

114. ACF makes two submissions in support of this ground.

115. *First*, ACF contends that the Minister's reasons are missing a particular analysis, i.e., a recognition that, because the global atmosphere is so large, every greenhouse gas emitting action will have a relatively "*small*" effect, and that because climate change is produced by an aggregation of greenhouse gases in the atmosphere, every contribution of greenhouse gas is "*significant*": ACF [218]-[220]. That is said to reveal an erroneous construction in which the Minister limited the factual inquiry to one that focused solely on the "*size*" of greenhouse gas emissions likely to result from the proposed activity: ACF [220].

116. *Secondly*, ACF contends that the text of s 527E is "*clearly wide enough to permit the factual inquiry just discussed*" (ACF [221]), and given this "*constructional choice*", the broader choice should be preferred on the basis that it is consistent with the objects of the Act, specifically to "*provide protection of the environment*" (s 3(1)(a)) and assist in

108 [2019] FCAFC 60; (2019) 270 FCR 267 at [191]-[193].

the “*co-operative implementation of Australian’s international environmental responsibilities*” (s 3(1)(e)).

Summary of Woodside’s submissions in response

117. Woodside’s submissions in response are, in summary, as follows.

118. *First*, the issue of whether the projected future impacts of climate change were impacts of the NWS Project Extension had been determined in the Controlled Action Decision and the Reconsideration Decision. The Minister did not err by not revisiting that issue again at the Approval Decision.

119. *Secondly*, Ground 4 is not in truth a ground concerned with statutory construction: it is an attack on the Minister’s reasoning, by reference to factual propositions about the nature of climate change.

120. *Thirdly*, the question as to what is a “*substantial cause*” in s 527E(1)(b) is largely a question of fact for the Minister (subject to limits such as those in s 527E(2)) – the Minister was not required to adopt the analysis identified by ACF.

121. *Fourthly*, the Minister’s reasoning was consistent with the text of s 527E and the authorities which have considered it.

122. *Fifthly*, Ground 4 attacks only one of the alternative bases for the Minister’s conclusion that the action would not be a substantial cause of climate change impacts. Accordingly, even if ACF were correct in its submissions (which is denied), it would make no difference to the outcome of the decision.

123. Before turning to the substance of Woodside’s arguments, it is first necessary to address two matters:

    123.1 the Minister’s reasoning in relation to his decision that the proposed action was not a substantial cause of the stated physical effects of climate change on the National Heritage values of a National Heritage place; and

    123.2 the decisions of this Court in *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)*[109] (***ECCQ PJ***) and then on appeal in *Environment Council of Central Queensland Inc v Minister for the*

[109] [2023] FCA 1208; (2023) 413 ALR 318.

Environment and Water[110] (***ECCQ FC***) which considered relevantly identical reasoning to that of the Minister in this case.

124. The following submissions on Ground 4 also address (at paragraphs 187 to 191) the submissions of the amicus, the United Nations Special Rapporteur on the human right to a clean, healthy and sustainable environment (***Special Rapporteur***).[111]

Minister's reasoning

125. As stated above:

125.1 on 8 July 2022, EJA (on behalf of its client ECCQ) submitted the Reconsideration Request under s 78A(1) in respect of the original controlled action decision on the basis of the availability of substantial new information;[112]

125.2 on 20 May 2025, the Minister determined that the proposed action was not a substantial cause of the stated physical effects of climate change on MNES and confirmed the Controlled Action Decision;[113] and

125.3 the Minister provided reasons for that determination to EJA on 29 September 2025.[114]

126. The Minister's reasoning arose, in broad terms, from a request that the Minister expand the controlling provisions applicable to the action because of information said to establish four propositions:[115]

> First, it is unequivocal that human influence has warmed the atmosphere, ocean and land. There is an approximately linear relationship between cumulative anthropogenic CO2 emissions and global temperature, such that every tonne of CO2 emissions adds to global warming. Reaching net zero anthropogenic CO2 emissions is a requirement to stabilise human-induced global temperature at any level. (See **Annexure 2, Pt B**).
>
> Second, limiting human-induced global warming requires deep reductions in CO2 and other greenhouse gas emissions in the coming decades. Without a strengthening of current policies, greenhouse gas emissions are projected to rise beyond 2025, leading to a median global warming of 3.2 [2.2 to 3.5]°C by 2100. A significant proportion of total net anthropogenic greenhouse gas emissions comes from the energy supply sector.

110 [2024] FCAFC 56; (2024) 304 FCR 91.

111 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], UNSR [39]-[49] in respect of Ground 4, and UNSR [59] in respect of Ground 3. Woodside has not responded to any paragraphs outside of the grant of leave, and understands that the balance of the submissions filed by the Special Rapporteur on 2 June 2026 are not before the Court in this proceeding.

112 Reasons at [34]; Decision Brief, Document F99.

113 See October Bester Affidavit, Exhibit CB-4.

114 Reconsideration Reasons; affidavit of Cecile Elizabeth Bester affirmed on 27 February 2026 (***February Bester Affidavit***), Exhibits CB-26 and CB-27.

115 See February Bester Affidavit, Exhibit CB-2 [26].

> The modelled pathways for limiting warming necessitate drastic cuts to the use of coal, oil and gas, and requires a substantial amount of fossil fuels to remain unburned. (See **Annexure 2, Pt C**.)
>
> Third, human-induced climate change will cause unavoidable increases in multiple climate hazards. In Australia, the physical effects of increasing global warming include fire, heat extremes, marine heatwaves and acidification, heavy precipitation and flooding, and drought. The regularity, scope and intensity of these events increases in direct relation to increasing global warming. Every 0.5°C of global warming causes clearly discernible increases in the intensity and frequency of hot extremes, precipitation events, and agricultural and ecological droughts. (See **Annexure 2, Pt D**.)
>
> Fourth, these physical effects of increased global warming in Australia are likely to have a significant impact on [various] MNES …

127. The Minister's power in s 78 to reconsider the delegate's earlier controlled action decision depended on that information being about the <u>impacts that the proposed action has, will have or is likely to have</u> on MNES.[116] That is, the issue was whether the impacts of climate change were impacts of the action, having regard in the main to greenhouse gas emissions derived from the combustion by third parties of gas processed at the Karratha Gas Plant.[117] The Minister concluded that the information was not about impacts the proposed action has or will have, or is likely to have, on these protected matters.[118]

128. In so deciding, the Minister accepted that:

   128.1 the Reconsideration Request contained information which demonstrated in a general sense that climate change from anthropogenic sources of GHG emissions has and/or will have physical effects on protected matters;[119]

   128.2 the combustion of coal and/or gas on a global scale results in GHG emissions, which increases the effects of climate change, including the regularity, scope and intensity of climate hazards, and that these effects of climate change will adversely affect the MNES identified by ECCQ in its request;[120] and

   128.3 the physical effects of climate change on the MNES were, if anything, indirect consequences of the proposed action, as they resulted from emissions from third party use of the gas to be processed in the proposed action.[121]

---

116 Act, s 78(1)(a).
117 Reconsideration Reasons at [78]-[79].
118 Reasons at [39].
119 Reasons at [36].
120 Reasons at [36].
121 Reasons at [37].

129. However, the Minister considered that:[122]

> … the proposed action is not a substantial cause of the stated physical effects of climate change on MNES. Therefore, I concluded that the information is not about impacts the proposed action has or will have, or is likely to have, on these protected matters. This was because:
>
> a) The information did not demonstrate that the proposed action will cause any net increase in global GHG emissions and global average temperature (and so, any of the stated physical effects of climate change on MNES). Whether this will happen is subject to multiple variables; and
>
> b) Even if that were demonstrated, any contribution from the proposed action to global GHG emissions would be very small. It was therefore not possible to say that the proposed action will be a substantial cause of the stated physical effects of climate change on MNES.

130. This reasoning involved two independent limbs: the first finding that the information did not demonstrate that the proposed action would cause any net increase in greenhouse gas emissions or global average temperature; and the second finding that, even if it were demonstrated that the proposed action *would* cause a net increase, the proposed action would not be a substantial cause of the the stated physical effects of climate change on MNES.

131. The Minister referred to this reasoning in determining that the proposed action was not a substantial cause of the stated physical effects of climate change on MNES in his reasons for the Approval Decision.[123]

Decisions of this Court in *ECCQ PJ* and *ECCQ FC*

132. *ECCQ PJ* and *ECCQ FC* concerned two controlled action decisions of the Minister under s 75(1) of the Act, one concerning a proposed action to extend underground mining operations at the existing Narrabri underground coal mine in New South Wales, and one concerning a proposed action to increase the open cut coal extraction within the Mount Pleasant project development area, also in New South Wales.[124] Neither of those controlled action decisions identified as relevant impacts any impacts on MNES arising from greenhouse gas emissions associated with the extension of the operation of the coal mines, and in particular, did not identify as relevant impacts any impacts on MNES arising from the combustion of the coal produced by the mines by third parties.[125]

---

122 Reasons at [39].

123 Reasons at [34]-[40], [80].

124 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [3]-[4].

125 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [6], [16].

133. ECCQ made reconsideration requests in respect of each decision under s 78A(1) of the Act, providing what it contended was "*substantial new information*" about the impacts, or likely impacts, of each proposed action on matters protected by Part 3 of the Act. ECCQ contended that:

133.1 the delegate had not considered the effects of GHG emissions from the combustion of coal produced by the two mines, if their life and production capacity were extended as the second respondents sought to do;

133.2 by those emissions, the proposed projects would have, or would be likely to have, significant physical effects on MNES, including a number of MNES not listed as controlling provisions in the controlled action decisions.

134. ECCQ requested that the Minister revoke the original controlled action decisions and substitute a new decision under s 75(1) of the Act, listing all MNES that it had identified as affected by climate change as controlling provisions.[126]

135. The Minister decided not to revoke the controlled action decisions and instead confirmed them pursuant to s 78C(1)(b)(i) of the Act.[127] Relevantly the Minister was not satisfied that either proposed action was a "*substantial cause*" (within the meaning of s 527E) of "*the stated physical effects of climate change on world heritage values of declared World Heritage properties*" for two reasons. He said:[128]

> … the proposed action is not a substantial cause of the stated physical effects of climate change on MNES. Therefore, I concluded that the information is not about impacts the proposed action has or will have, or is likely to have, on these protected matters. This was because:
>
> (a) The information does not demonstrate that the proposed action will cause any net increase in global GHG emissions and global average temperature (and so, any physical effects of climate change on the world heritage values of declared World Heritage properties). I considered that whether this will happen is subject to multiple variables [***first limb***]; and
>
> (b) even if that were demonstrated, any contribution from the proposed action to global GHG emissions would be very small. It is therefore not possible to say that the proposed action will be a substantial cause of the physical effects of climate change on the world heritage values of declared World Heritage properties [***second limb***].

136. ECCQ sought judicial review of both of those decisions.

---

126 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [12].

127 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [13].

128 See *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [33]. The Minister's principal reasoning occurred in the section of her reasons dealing with world heritage values of declared World Heritage properties. The Minister then confirmed and carried that reasoning into the sections of her reasons dealing with other MNES: see *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [24].

137. The Federal Court at first instance and on appeal rejected submissions that the Minister had erred by reasoning that the actions in those cases were not a substantial cause of the alleged impacts for the reasons set out in the Minister's first limb[129] and second limb[130] above. ECCQ was refused special leave to appeal to the High Court, with costs.[131]

ECCQ PJ

138. Before the primary judge, the main thrust of ECCQ's argument was that many MNES:[132]

> … had been impacted and were likely to be impacted by climate change and that in each case the proposed action is a substantial cause of the adverse effects of climate change on MNES, so as to engage the indirect impact provision at s 527E.

139. ECCQ advanced ten grounds of review in respect of the reasoning set out at paragraph 135 above. Grounds 7 and 10 are relevant to the present case.

140. Ground 7 concerned the Minister's finding of "*substantial cause*". The gravamen of ECCQ's complaint was that the Minister had erroneously equated "*substantial*" with "*large numerical significance*".[133]

141. Justice McElwaine dismissed that ground. His Honour emphasised that the question of "*substantial cause*" was a factual inquiry for the Minister, stating that:[134]

> Parliament has entrusted the Minister to undertake a broad evaluative assessment to revoke and substitute a controlled action decision only if satisfied that to do so is warranted by the availability of substantial new information about the impacts of the action on MNES. The Minister is constrained by the meaning that Parliament has determined for what is an *impact* at s 527E. For an event or circumstance that is an indirect consequence of the proposed action, the field of inquiry is broad and necessarily fact determinative. A commonsense cause and effect analysis is required. In performing that task, it is a matter for the Minister to make an informed judgment on the question of substantial cause. …
>
> Whether a proposed action is a substantial cause of an indirect event or circumstance turns upon identification of the content of the proposed action, the event or circumstance and the chain of reasoning that is necessary to conclude that the statutory

---

129 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [82], [92], [98] and [148]; *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [78], [90], [109] (Mortimer CJ and Colvin J), [184], [195] (Horan J). For an explanation of which grounds relate to which limbs, see *ECCQ PJ* at [61] and *ECCQ FC* at [65].

130 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [156] and [162]; *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [139] (Mortimer CJ and Colvin J), [193], [195] (Horan J).

131 *Environment Council of Central Queensland Inc. v Minister for the Environment and Water & Anor* [2024] HCASL 201.

132 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [15].

133 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [149]-[150].

134 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [153]-[154].

> causal relationship exists. So understood, it is an error to construe substantial in isolation: the inquiry is about substantial cause of one or more indirect events or circumstances, the answer to which will be revealed by the particular facts and circumstances under consideration. In some cases, numerical significance may be insufficient. In others, a small numerical significance may have large consequences. The interrelationship of particular actions, identifiable events or circumstances and attribution of substantial cause is a factual matter for the Minister.

142. Ground 10 asserted irrationality in the Minister's reasoning on the second limb, contending that the Minister's reasoning was "*based on fixed proportions arrived at by using deterministic fixed denominators when dealing with the likelihood [of a] future*" where there was a large spectrum of possible scenarios.[135] Justice McElwaine rejected this submission, finding that it was not irrational to use present figures to predict future coal use, even though those figures may change over time.[136] Justice McElwaine concluded that there was nothing in the Minister's reasons which "*bespeaks of legal irrationality, as distinct from the applicant's strong disagreement with how the Minister reasoned*".[137]

ECCQ FC

143. On appeal to the Full Court, ECCQ advanced five grounds of appeal. Ground 5 alleged error in the primary's judge reasons in relation to grounds of review 7 and 10.

144. The Full Court, comprising Mortimer CJ and Colvin J in a joint judgment and Horan J writing separately, dismissed each ground of appeal.

145. Chief Justice Mortimer and Colvin J rejected a submission by ECCQ that the two limbs at paragraph 135 above were interdependent and accepted a submission by the Minister in that case that the two limbs were "*independent of each other*", saying "*so much is apparent from the commencing words 'even if'*".[138] Their Honours described the two limbs as "*alternative paths of reasoning*".[139]

146. Chief Justice Mortimer and Colvin J observed that ECCQ's main point in Ground 5 was not a construction point about the meaning of "*substantial cause*", but a factual

---

135 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [160].
136 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [161].
137 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [161].
138 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [120] (Mortimer CJ and Colvin J).
139 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [59] (Mortimer CJ and Colvin J). See also [103] and [106] (Mortimer CJ and Colvin J).

attack on the Minister's failure to consider certain scenarios in terms of the global levels of emissions and warming.[140] Their Honours rejected this attack, stating that:[141]

> The legislative scheme of the [Act] deals with a wide and diverse range of MNES, and actions that may affect them, including (as this appeal amply demonstrates) the need to assess complex and changing information. Without clear justification in text, context and purpose, it would be wrong to construe the scheme as requiring the Minister to adopt any particular method or approach, or to constrain the way the Minister must reason. That is especially so where the impacts under consideration are agreed to be caused by global phenomena.
>
> Granted, a Minister must reason rationally, and must act reasonably, and make their decision on the basis of probative material. Beyond this, … [t]here is no basis in the legislative scheme to discern a constraint on the way the Minister should reason, nor to discern a constraint on the nature of the information she may select from what is before her, provided as we have explained, it meets the threshold of probative material, and is used in a rational and legally reasonable way in making the decision.

147. Their Honours caveated this statement with the observation that:[142]

> Neither in grounds of review before the primary judge, nor in grounds of appeal before this Court, was any argument developed by the appellant about a fundamentally different interpretation of the phrase "substantial cause" in s 527E(1)(b) to the one adopted by the Minister. There was no developed argument about whether the phrase had a qualitative meaning that *could not*, for example, be reduced to an arithmetical analysis, where the cause was a global one (combustion of coal) and the impacts were also global, although relevantly felt across a wide range of MNES within Australia.

148. Significantly, in the course of their Honours' conclusion, Mortimer CJ and Colvin J made observations about the ill-suitedness of the Act to deal with the global phenomenon of climate change, with which Horan J agreed. These are set out in more detail at paragraphs 152-153 below.

Point not argued in *ECCQ FC*

149. ACF submits that the "*point not argued in [ECCQ FC at [46]] is the point that is argued here*": ACF [214]. That is the point extracted at paragraph 147 above.[143]

150. It is necessary to make two observations about that paragraph.

151. *First*, the paragraph makes no more than an observation as to what was not argued on appeal. It states that there was "*no developed argument*" about whether "*substantial cause*" had a particular qualitative meaning. The joint judgment did not undertake the

---

140 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [121] (Mortimer CJ and Colvin J).

141 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [132]-[133] (Mortimer CJ and Colvin J).

142 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [46] (Mortimer CJ and Colvin J). See also [122], [129], [134] and [138(c)] (Mortimer CJ and Colvin J), [193] (Horan J).

143 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [46] (Mortimer CJ and Colvin J). See also [129], [138(c)] (Mortimer CJ and Colvin J).

task of itself developing that argument or giving content to the term "*qualitative*", much less suggesting that such an argument was truly available or even that the Minister's reasons might properly be characterised as not "*qualitative*". It may be said that that point was expressly left open by the reasons, but it cannot be said that it was endorsed by the reasons.

152. *Secondly*, the joint judgment made other observations (with which Horan J agreed) that were inconsistent with the availability of the point not argued. In its concluding paragraphs, the joint judgment observed that the arguments made on the appeal underscored the "*ill-suitedness of [the Act] to the assessment of environmental threats such as climate change and global warming and their impacts on MNES in Australia*".[144] The joint judgment then cited an observation of the **E**uropean **C**ourt of **H**uman **R**ights in *Verein KlimaSeniorinnen Schweiz v Switzerland* (ECHR, Grand Chamber, Application No 53600/20, 9 April 2024), which is worth setting out at length here also because of its relevance to the arguments in this proceeding:[145]

> The Court's existing case-law in environmental matters concerns situations involving specific sources from which environmental harm emanates. Accordingly, those exposed to that particular harm can be localised and identified with a reasonable degree of certainty, and the existence of a causal link between an identifiable source of harm and the actual harmful effects on groups of individuals is generally determinable. Furthermore, the measures taken, or omitted, with a view to reducing the impugned harm emanating from a given source, whether at the regulatory level or in terms of implementation, can also be specifically identified. In short, there is a nexus between a source of harm and those affected by the harm, and the requisite mitigation measures may be identifiable and available to be applied at the source of the harm.
>
> In the context of climate change, the key characteristics and circumstances are significantly different. *First, there is no single or specific source of harm. GHG emissions arise from a multitude of sources. The harm derives from aggregate levels of such emissions. Secondly, CO_2 – the primary GHG – is not toxic per se at ordinary concentrations. The emissions produce harmful consequences as a result of a complex chain of effects. These emissions have no regard for national borders*.
>
> Thirdly, that chain of effects is both complex and more unpredictable in terms of time and place than in the case of other emissions of specific toxic pollutants. Aggregate levels of CO_2 give rise to global warming and climate change, which in turn cause incidents or periods of extreme weather; these in turn cause various harmful phenomena such as excessive heatwaves, droughts, excessive rainfall, strong winds and storms, which in turn give rise to disasters such as wildfires, floods, landslides and avalanches. The immediate danger to humans arises from those kinds of consequences in the given climate conditions. In the longer term, some of the consequences risk

144 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [140] (Mortimer CJ and Colvin J), [194] (Horan J agreeing).

145 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [141] (Mortimer CJ and Colvin J), citing *Verein KlimaSeniorinnen Schweiz v Switzerland* (ECHR, Grand Chamber, Application No 53600/20, 9 April 2024) at [415]-[417] (emphasis added).

> destroying the basis for human livelihoods and survival in the worst affected areas. Whole populations are, or will be, affected, albeit in varying ways, to varying degrees and with varying severity and imminence of consequences.

153. The joint judgment then stated that "*[s] 527E and its approach to 'indirect impact' is especially ill-suited, coming as it does from a very different legislative historical background, located in the 'downstream effects' decision of this Court in the Nathan Dam line of authorities*" and that:[146]

> There is no comparison between indirect impacts of the kind discussed in the *Nathan Dam* authorities, and indirect impacts from a global phenomenon such as climate change. This proceeding, and the merits decision-making underlying it, might be said to raise the question whether the legislative scheme is fit for purpose in this respect.

154. Not only do ACF's submissions not deal with the inconsistency of these passages with the arguments that it now makes, but its submissions are to contrary effect. At ACF [219], ACF identifies an analysis which is very similar to the underlined italicised text above. ACF contends at ACF [220] that the absence of this analysis from the Minister's reasons bespeaks error.

Issue of physical impacts of climate change had been determined by the time of the Approval Decision

155. The issue of whether the proposed action was a "*substantial cause*" of the impacts of climate change on MNES arose, for the purpose of the Reconsideration Decision, in the context of the issue of whether the Minister's delegate had adopted too narrow a set of controlling provisions.[147] The effect of the Reconsideration Decision was to leave in place the controlling provisions that had been determined in the Controlled Action Decision – ss 15B and 15C – the potential impacts identified in that regard being "*[u]nauthorised access by project personnel to areas outside the development footprint that may disturb petroglyphs*" and "*the (unclear) impact of airborne gas emission from the [Karratha Gas Plant] on the petroglyphs (rock art)*".[148]

156. By the time of the Approval Decision, the controlling provisions had been determined and the focus of the Minister, consistently with the Controlled Action Decision and assessment process in respect of MNES, was the potential impact on the rock art of the

---

146 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [143]-[144] (Mortimer CJ and Colvin J), [194] (Horan J agreeing).

147 Decision Brief, Document F99 at [7] (EJA Reconsideration Request). See also Decision Brief, Document F15 (Referral Decision Brief) at 16-23 and Reconsideration Reasons at [147].

148 Decision Brief, Document F15 (Referral Decision Brief) at 9.

Dampier Archipelago and, most critically, the impact of industrial air emissions on the rock art.

157. A submission from Friends of Australian Rock Art Inc that was before the Minister did include, as one of its criticisms of the State assessment process, an argument that "*[n]otwithstanding the reconsideration request, … an assessment of the climate change impacts arising from the proposal on all National Heritage values is required*" and referred to other National Heritage places in Western Australia and elsewhere.[149]

158. That submission may explain the sentence in the Reasons (at [80]) referring to the Reconsideration Request and the view formed that the physical impacts of climate change were not impacts of the proposed action within the meaning of "*impact*" in s 527E of the Act. However, it cannot seriously be suggested that, by the time of the Approval Decision the Minister was permitted, let alone required, to revisit the s 527E issue that had been the basis of earlier decisions determining the controlling provisions (which, in turn, determined (among other things) the *relevant impacts* for the purpose of assessing the action).[150]

Woodside's submissions on proper construction of "*substantial cause*"

159. The proper construction of a statute involves giving "*effect to the ordinary meaning of its text in the wider statutory context and with reference to the purpose of the provision*".[151]

<u>Statutory text</u>

160. Section 527E(1) provides that:

> For the purposes of this Act, an event or circumstance is an ***impact*** of an action taken by a person if:
>
> (a) the event or circumstance is a direct consequence of the action; or
>
> (b) for an event or circumstance that is an indirect consequence of the action – subject to subsection (2), the action is a substantial cause of that event or circumstance.

161. Section 527E addresses the meaning of "*impact*", in a way that is both definitional and limiting:

149 Decision Brief, Document E2 at 28-31.

150 Act, ss 81, 82, 87.

151 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* [2015] HCA 41; (2015) 256 CLR 569 at [11] (French CJ, Kiefel and Bell JJ), [149] (Keane J).

161.1 it incorporates several tests of causation by reference to the expressions "*consequence*", "*substantial cause*", "*takes an action*", "*direction or request*" and "*facilitates, to a major extent*";

161.2 it incorporates further limits by reference to the expressions "*reasonably foreseeable consequence*" and "*contemplation*"; and

161.3 unlike some other provisions of the Act, it does not incorporate any test of likelihood as to these matters.[152]

162. The present challenges are concerned with one of those limits – the concept of "*substantial cause*".

163. In *ECCQ PJ*, McElwaine J said as follows:[153]

> Whether a proposed action is a substantial cause of an indirect event or circumstance turns upon identification of the content of the proposed action, the event or circumstance and the chain of reasoning that is necessary to conclude that the statutory causal relationship exists. So understood, it is an error to construe substantial in isolation: the inquiry is about substantial cause of one or more indirect events or circumstances, the answer to which will be revealed by the particular facts and circumstances under consideration. In some cases, numerical significance may be insufficient. In others, a small numerical significance may have large consequences. The interrelationship of particular actions, identifiable events or circumstances and attribution of substantial cause is a factual matter for the Minister.

164. This passage, with respect, accurately emphasises a number of matters.

165. *First*, it articulates the test to be applied by using the language and concepts identified by the statute, rather than using words that do not appear in the statute.[154] While parties and courts often seek to deploy synonyms to identify the essential meaning of the text of a statute, caution should be exercised in the use of words such as "*qualitative*" and "*quantitative*" lest they distract from the focus on the text and operation of the statute.

166. *Secondly*, it recognises that the concept of an "*indirect consequence of an action*" requires a <u>causal relationship</u>. By using the terms "*consequence*" and "*cause*", Parliament has selected "*a concept that establishes a link between a physical event and a physical outcome*."[155] A "*cause*" is the person, event, or condition that makes

---

152 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [56] (Mortimer CJ and Colvin J), [187] (Horan J).

153 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [154].

154 *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 236 FCR 199 at [262] (Allsop CJ); *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50; (2013) 253 CLR 284 at [71] (Hayne J).

155 *Lewis v Australian Capital Territory* [2020] HCA 26; (2020) 271 CLR 192 at [151] (Edelman J) (footnotes omitted).

something else happen – it is "*that which produces an effect; that which gives rise to any action, phenomenon or condition*".[156]

167. Put differently, "*causation*" is about the identification or attribution of responsibility. The concept of "*substantial cause*" has been said in the context of charges for offences under the *Environmental Planning and Assessment Act 1979* (NSW) to involve "*applying commonsense to the underlying facts as found, 'appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter'*"[157] and (in a negligence context) to mean negligence "*sufficiently important and closely connected with the accident to make it reasonable on a broad common-sense view to regard its author as responsible for it in law*".[158] As Kirby J observed in *Chappel v Hart*:[159]

> In an attempt to assist decision-makers in the task of drawing lines and in the assignment of legal responsibility, various phrases have been proffered by generations of judges to mark out a legally relevant cause (such as "proximate cause", "legal cause", "true cause", "effective cause", "substantial cause", "direct cause", "foreseeable cause" or "cause in fact").

168. The emphasis on the attribution of "*responsibility*" is also evident in s 527E(2), to which s 527E(1)(b) is expressly subject. Section 527E(2) specifies conditions, which, if satisfied, mean that the intervention of a third party will not break the chain of causation between an action and effects on the environment. Those conditions are relevant here. For example, the constraining function of s 527E, in terms of assigning responsibility for impacts to a primary action (as that term is defined in s 527E(2)(a)) would appear to be set at naught if the alleged impact was not the direct consequence of any secondary action (as that term is defined in s 527E(2)(b)). ACF does not engage with how the constraints in s 527E(2)(e)-(g) work in the context of a climate change impact or how its purported construction of "*substantial cause*" coheres with those constraints.

169. *Thirdly*, the passage from the judgment of McElwaine J recognises that the function performed by the word "*substantial*" is to qualify "*cause*": a causal relationship is

---

156 See *Macquarie Dictionary* (online) "cause" (def 1); *Oxford English Dictionary* (online) "cause" (n, def I.2).

157 See *Erector Group Pty Ltd v Burwood Council* [2018] NSWCCA 56; (2018) 232 LGERA 304 at [95] (Bathurst CJ).

158 *State Electricity Commission (Vic) v Gay* [1951] VLR 104 at 106, discussed in *Fitzgerald v Penn* [1954] HCA 74; (1954) 91 CLR 268 at 275-276 (Dixon CJ, Fullagar and Kitto JJ).

159 [1998] HCA 55; (1998) 195 CLR 232 at 270 [93].

necessary but not sufficient,[160] and an action must be both a *cause*, and relevantly must be a *substantial* cause, of the identified impact in order for the impact to be an impact of the action for the purposes of the statutory scheme.

170. *Fourthly*, the word "*substantial*" is an ordinary English expression, and whether or not a particular matter falls within the meaning of an ordinary English expression is a question of fact.[161] Justice McElwaine described the word "*substantial*" as a "*word of evaluative concept*", "*susceptible of ambiguity*", which involves "*a lack of precision*". In an appropriate circumstance, as McElwaine J recognises, a small numerical significance may have large consequences. The Act does not prescribe "*the frame of reference*" by which the Minister is to undertake the assessment of whether the proposed action is a "*substantial*" cause of the relevant effect or circumstance.[162] This underscores that the absence of a particular analysis from the Minister's reasons is unlikely to be demonstrative of an error of construction. Rather, it reflects that, subject to limits such as those imposed by s 527E(2), the inquiry is for the Minister and it is a factual one.[163]

<u>Legislative history</u>

171. Section 527E was inserted into the Act following the decision of the Full Court in *Minister for the Environment and Heritage v Queensland Conservation Council Inc*[164] (***Nathan Dam FC***). There, the proposed action was the construction and operation of a dam on the Dawson River in Central Queensland, to make "*controlled discharges of water for agricultural, industrial, urban and environmental uses*". The context included, according to the proponent's referral, that the expansion of agricultural activities was constrained by the lack of water, which the dam would provide, and which would mean that the region would be able to attract new development.[165]

172. Submissions were made to the Minister that irrigation of land adjacent to river-beds (using water from the dam) had the potential to increase nutrient concentrations and

---

160 See *Badawi v Nexon Asia Pacific Pty Ltd* [2009] NSWCA 324; (2009) 75 NSWLR 503 at [82] (Allsop P, Beazley and McColl JJA).

161 *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 at 62 [28] (Spigelman CJ).

162 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [80].

163 *ECCQ PJ* [2023] FCA 1208; (2023) 413 ALR 318 at [80].

164 [2004] FCAFC 190; (2004) 139 FCR 24.

165 *Nathan Dam FC* [2004] FCAFC 190; (2004) 139 FCR 24 at [58]-[59] (Black CJ, Ryan and Finn JJ).

other agricultural pollutants downstream of the dam, with consequent effects on the Great Barrier Reef.[166]

173. At first instance, Kiefel J emphasised that the Minister should undertake "*a wide consideration of the consequences which will follow if a proposed activity proceeds*"[167] and found that the Minister was wrong to shut out any consideration of the potential impacts of the irrigation of land by persons other than the proponents, using water from the dam.[168] Her Honour's conclusion was upheld on appeal, where the Full Court said that:[169]

> ["Impact"] includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter. Provided that the concept is understood and applied correctly in this way, it is a question of fact for the Environment Minister whether a particular adverse effect is an "impact" of a proposed action.

174. The purpose of introducing s 527E following the decision in *Nathan Dam FC* was stated in the extrinsic materials to be "*to clarify the extent to which impacts which are indirect consequences of actions must be considered or dealt with under the Act*".[170]

No error by the Minister

175. There was no error by the Minister in his conclusion that the proposed action was not a substantial cause of the stated physical effects of climate change on the MNES.

176. It is convenient to repeat the critical paragraphs of the Minister's reasons here. The Minister decided that:[171]

> I considered that the proposed action is not a substantial cause of the stated physical effects of climate change on MNES. Therefore, I concluded that the information is not about impacts the proposed action has or will have, or is likely to have, on these protected matters. This was because:
>
> a) The information did not demonstrate that the proposed action will cause any net increase in global GHG emissions and global average temperature (and so, any of the stated physical effects of climate change on MNES). Whether this will happen is subject to multiple variables; and

---

166 *Nathan Dam FC* [2004] FCAFC 190; (2004) 139 FCR 24 at [22] (Black CJ, Ryan and Finn JJ).

167 *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (***Nathan Dam***) at [31], quoted in *Nathan Dam FC* [2004] FCAFC 190; (2004) 139 FCR 24 at [25].

168 *Nathan Dam* [2003] FCA 1463 at [39]–[41], quoted in *Nathan Dam FC* [2004] FCAFC 190; (2004) 139 FCR 24 at [28].

169 *Nathan Dam FC* [2004] FCAFC 190; (2004) 139 FCR 24 at [53] (Black CJ, Ryan and Finn JJ).

170 *Explanatory Memorandum to the Environment and Heritage Legislation Amendment Bill (No 1) 2006* at [519].

171 Reasons at [39].

b) Even if that were demonstrated, any contribution from the proposed action to global GHG emissions would be very small. It was therefore not possible to say that the proposed action will be a substantial cause of the stated physical effects of climate change on MNES.

177. As in the ECCQ reconsideration request reasons, these paragraphs represented two alternative and available paths of reasoning for the Minister's conclusion that the action was not a "*substantial cause*" of the stated physical effects of climate change on MNES.[172]

178. The first paragraph was a conclusion that, because of the numerous variables that contribute to climate change, the relevant information did not demonstrate that the proposed action would cause *any* net increase in global GHG emissions and global average temperature; and so nor was the proposed action demonstrated to cause the extreme weather events caused by global warming, with consequent effects on MNES. That was a material basis of the decision not to consider the new information in the exercise of the power under s 78(1).

179. The second paragraph was an alternative conclusion that, *even if* the Minister was satisfied that the proponent's action would cause a net increase in global GHG emissions and global average temperature (of which he was not satisfied), it was "*not possible*" to say that the proposed action would be a "*substantial cause*" of the net increase in global GHG emissions and global average temperature where the contribution would be "*very small*". This does not reflect a misconstruction of the statutory test in s 527E. The Minister was required to consider whether the proponent's action was a "*substantial cause*" of the stated physical effects of climate change on MNES. The Minister had before him information which stated that the proposed action's total average annual emissions (scope 1, 2 and 3) within Australia and outside Australia combined:[173]

179.1 represented 0.183% of global emissions (measured in CO_2-e) in 2019; and

179.2 represented 0.177% of global emissions in 2021.

180. It is from these figures that the Minister drew the conclusion that any contribution to the net increase in global greenhouse gas emissions and global average temperature was "*very small*".

---

172 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [59]. See also [103], [106].

173 Decision Brief, Document F101 (Reconsideration Decision Brief) at [74]-[75].

181. ACF, supported by the Special Rapporteur, submits that the Minister's error lay in relying on that "*very small*" contribution. However, it was open to Minister to form the view that such a contribution (and even leaving aside other matters such as the additional requirements of s 527E(2)) would not qualify as a substantial cause.

Response to particular aspects of ACF (and Special Rapporteur) arguments

182. ACF makes very little reference to the text, purpose or context of s 527E. Indeed, a basic flaw in ACF's submissions is that they start with factual propositions about climate change and reason from them to assertions about what s 527E accommodates or requires. While there is a cursory reference to the text of s 527E being "*wide*", and to the objects of the Act, the substance of the argument is a criticism of the Minister's reasoning by reference to propositions about climate change, and the repeated invocation of a distinction between "*qualitative*" and "*quantitative*" approaches and the unexplained assertion that the Minister adopted the latter but not the former. ACF's submissions suffer the same vice as ECCQ's submissions in *ECCQ FC* and should be dealt with as the Full Court did in *ECCQ FC.*[174]

183. Moreover, the appeal to the objects of the Act fails to heed the caution issued by Gleeson CJ in *Carr v Western Australia*[175] and endorsed by the High Court in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd.*[176] His Honour the Chief Justice said:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object … That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem …

184. Chief Justice Gleeson further observed that it is the text, properly construed, that is controlling, and that the question to be addressed is not what was the purpose or object underlying the legislation, but "*how far does the legislation go in pursuit of that purpose or object*".[177]

---

174 *ECCQ FC* [2024] FCAFC 56; (2024) 304 FCR 91 at [121]-[122].

175 [2007] HCA 47; (2007) 232 CLR 138 at [5] (Gleeson CJ).

176 [2013] HCA 36; (2013) 248 CLR 619 at [40].

177 [2007] HCA 47; (2007) 232 CLR 138 at [6]-[7].

185. Here the Act does not pursue protection of the environment at all costs. Instead, the objective of protecting the environment sits side by side with the object of promoting ecologically sustainable development (s 3(1)(b)). Section 3A(1)(a) provides that the principles of ecologically sustainable development include that decision making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.

186. As to the appeal to international obligations, Woodside makes the following submissions.

187. *First*, the relevant parts of the Act were not enacted "*to facilitate compliance*" with the international obligations to which ACF or the Special Rapporteur refer (cf UNSR [12]). The Act was not intended to implement the United Nations Framework Convention on Climate Change (UNFCCC) Paris Agreement 2015 (***Paris Agreement***).[178] It is also not the purpose of the Act to give effect to any customary international law duty to act with due diligence to prevent significant harm to the environment.[179] However, this is the main international law rule to which the Special Rapporteur refers (relying on the discussion of that rule in the ICJ's Advisory Opinion on the Obligations of States in respect of Climate Change).[180]

188. *Secondly*, ACF relies on 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*").[181] The Special Rapporteur also makes submissions in support of this argument: UNSR [5]-[12]. However, no – or no adequate – content is given by ACF to the competing constructions said to be available, beyond

---

178 *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311 at [5] (Allsop CJ), [788] and [839] (Wheelahan J). The Commonwealth statute directed to the Paris Agreement is the *Climate Change Act 2022* (Cth). Commonwealth statutes directed to climate change issues generally include the *Australian Registry of Emissions Units Act 2011* (Cth); *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth); *National Greenhouse and Energy Reporting Act 2007* (Cth); *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (Cth); *Offshore Electricity Infrastructure Act 2021* (Cth); *Renewable Energy (Electricity) Act 2000* (Cth).

179 *Obligations of States in Respect of Climate Change (Advisory Opinion)* [2025] ICJ Rep 187 (***Advisory Opinion***) at [132] and [135].

180 Being an advisory opinion, it does not have a binding status.

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

vague reference to a "*qualitative*" approach, which is said to be lacking from the Minister's approach.[182]

189. That is, neither ACF nor the Special Rapporteur identify how its purported "*qualitative*" approach (and only such approach) would lead to compliance with a specific international law obligation. To the extent the suggestion may be that a customary law obligation of due diligence requires an environmental assessment of all greenhouse gas emissions (including of scope 3 emissions) for certain types of actions, unless the contention about a "*qualitative*" approach would mandate such an assessment in all such cases, then it is unclear how it would be in accordance with any particular suggested international law obligation. Neither ACF nor the Special Rapporteur go that far. Both seem to accept that even adopting a "*qualitative*" approach, the Minister might decide that greenhouse gas emissions of an action may not result in an impact assessed by reference to the s 527E tests. Indeed, the very existence of s 527E indicates that Parliament did not intend the Act to require an environmental assessment of all greenhouse gas emissions (including of scope 3 emissions) for actions.

190. *Thirdly*, the weight of authority is to the effect that the presumption of consistency only applies in respect of international obligations which bound Australia at the time that the relevant legislation was enacted (cf. UNSR [10]).[183] Section 527E was enacted in 2006 and entered into force in 2007.[184] The ICJ's Advisory Opinion, on which both ACF and the Special Rapporteur predominantly rely, was delivered in 2025. Its scope is limited to identifying and explaining the content of "*existing obligations*" under international law with respect to climate change,[185] but it does so based on, among other things, legal[186] and scientific developments post-dating 2006.[187] The Paris Agreement, on which the Special Rapporteur also relies, also post-dates 2006.

182 *Macoun v Federal Commissioner of Taxation* [2015] HCA 44; (2015) 257 CLR 519 at [67] (the Court). See also *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273, 287–8 (Mason CJ and Deane J).

183 See, e.g., *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20; (1995) 183 CLR 273, 287 (Mason CJ and Deane J): "*the courts should favour the construction which accords with Australia's obligations ... at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument*". See also *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 at [19] (Gleeson CJ). The Special Rapporteur does not cite any Australian case where the contrary position has been taken. The authority relied on at UNSR [10] (fn 15) relates generally to the "*always speaking*" principle, and does not concern this specific context.

184 *Environment and Heritage Legislation Amendment Act (No. 1) 2006* (Cth).

185 As the Special Rapporteur identifies at fn 65 of her submissions.

186 See, e.g., Advisory Opinion at [274]-[276], [328].

187 See, e.g., Advisory Opinion at [278].

191. *Fourthly*, UNSR [44] notes that, according to the ICJ's Advisory Opinion, causation is not required to establish a breach of a State's obligations. This submission in and of itself demonstrates the fallacy in the Special Rapporteur's attempt to construe s 527E by reference to the content of the ICJ's Advisory Opinion: causation is the organising principle of s 527E.

Materiality

192. By Ground 4 and the submissions advanced in respect of it (see especially at ACF [215]–[218]), ACF attacks the second limb of the Minister's reasons for concluding that the proposed action was not a substantial cause of the stated physical effects of climate change on MNES. It does not take issue with the reasoning in the first limb (noting that this limb also survived attack in *ECCQ PJ* and *ECCQ FC* – see above at paragraph 137).[188] Nor does ACF submit that the Minister's reasoning in the first limb would not be open on ACF's purported construction of substantial cause.

193. The first limb was the primary basis for the Minister's decision and was a sufficient basis for the decision that the proposed action was not a "*substantial cause*" of the alleged consequences. He was not satisfied that the proposed action would cause the net increase. The second limb was an independent, alternative limb for the decision, as is evident from the opening phrase "*even if that were demonstrated*". That the two limbs were independent and alternative was confirmed by Mortimer CJ and Colvin J in *ECCQ FC* (see paragraph 145 above).

194. That being the case, ACF cannot succeed because the first limb is an independent and sufficient basis for the Minister's conclusion that the physical effects of climate change were not an impact of the proposed action.

Conclusion on Ground 4

195. Ground 4 should be dismissed.

G. GROUND FIVE: BIAS

196. Ground 5 contends that a "*fair-minded lay observer might reasonably apprehend that the Minister might not have brought an impartial mind to the making of the Approval Decision in accordance with the [Act]*".

---

188 At ACF [212], ACF submits that the Full Court's analysis of the Minister's reasons applies equally to the Minister's reasoning process in the Reasons.

ACF's submissions

197. ACF's two core contentions, under the rubric of "*apprehended bias*", appear to be as follows:

 197.1 the sequencing of the Reconsideration Decision, the Reconsideration Reasons and the Approval Decision gave rise to a reasonable apprehension on the part of the fair minded observer that priority was given to securing the approval of the NWS Project Extension against the interests of its opponents: ACF [246]-[248].

 197.2 in communications between the Department and Woodside about the proposed conditions, Woodside was so influential or dominant that the Department watered down the conditions that had originally been proposed. The Minister was aware of this: ACF [250]-[254].

198. Overall, the asserted apprehension is one of "*undue partiality towards Woodside, and towards approval of the action*": ACF [226].

Summary of Woodside's submissions in response

199. Woodside makes the following submissions in response:

 199.1 *first*, the Minister did not owe a duty to accord procedural fairness to ACF. The rule against bias being one aspect of that duty, ACF cannot invoke it;

 199.2 *secondly*, the contentions on which ACF relies do not satisfy the tripartite test for apprehended bias; and

 199.3 *thirdly*, ACF relies on a distorted narrative of events, in support of both the sequencing and consultation limbs of its arguments.

200. Before addressing each of these arguments, we set out a summary of the relevant principles, focused on addressing certain lacuna in ACF's submissions on this topic.

Relevant principles

201. The rule against bias is one of the two rules of procedural fairness (the other being the hearing rule).[189] A duty to accord procedural fairness to a person includes a duty to be free of actual bias and from any reasonable apprehension of bias.[190]

---

189 *CNY17 v Minister for Immigration and Border Protection* [2019] HCA 50; (2019) 268 CLR 76 at [16] (Kiefel CJ and Gageler J), [131] (Edelman J).

190 See *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438 at [68] (McHugh J). See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; (2001) 206 CLR

When is procedural fairness owed?

202. A person is presumed to be owed procedural fairness where they have a right or interest of a character which is affected "*in a direct and immediate way*".[191] More recently the test has been described as: "*a statutory power which is capable of having an adverse effect on legally recognised rights or interests of individuals is impliedly conditioned on the observance of procedural fairness*".[192] However the authorities demonstrate that an interest giving rise to a right to be heard is not necessarily to be equated with an interest sufficient to found standing to bring proceedings.[193] That is particularly so in the context of public interest cases, where standing does not arise on the basis of a direct impact on a legal right, interest or expectation.[194]

203. In *Wilderness Society FC*,[195] Branson and Finn JJ held that, while the Wilderness Society clearly had standing to bring an application under s 487(3) of the Act, and had a statutory entitlement to provide comments to the proponents on a proposed pulp mill, the Wilderness Society was not entitled to procedural fairness. This was because the exercise of the power to approve the taking of a controlled action in s 133 of the Act was not one which would affect the Wilderness Society in respect of any tangible right, interest or expectation.

204. In *Rivers SOS Inc v Minister for Planning*,[196] Preston CJ held that Rivers SOS Inc, an incorporated association of about 40 environmental and community groups across New South Wales who were concerned about the impacts of mining operations on rivers and waters, was not owed procedural fairness in relation to a "*preferred project report*", because it had no right, interest or legitimate expectation that was affected in a direct and immediate way.

---

57 at [43] (Gleeson CJ and Hayne J); *Isbester v Knox City Council* [2015] HCA 20; (2015) 255 CLR 135 (***Isbester***) at [22].

191 *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 (***Kioa***) at 584 (Mason J). Cf. *HBMH v Commonwealth of Australia (No 2)* [2024] FCA 8 at [59]-[61].

192 *Disorganized Developments Pty Ltd v South Australia* [2023] HCA 22; (2023) 280 CLR 515 at [33] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), cited in *Badari v Minister for Territory Families and Urban Housing* [2025] HCA 47; (2025) 100 ALJR 30 at [17] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ).

193 *Rivers SOS Inc v Minister for Planning* [2009] NSWLEC 213; (2009) 178 LGERA 347 at [162].

194 *Botany Bay City Council v Minister for Transport and Regional Development* (1996) 66 FCR 537 at 568 (Lehane J).

195 *Wilderness Society FC* [2007] FCAFC 175; (2007) 166 FCR 154 at [88].

196 [2009] NSWLEC 213; (2009) 178 LGERA 347 at [162]-[164].

205. Most recently, in *Animals Australia v Secretary, Department of Agriculture, Water and the Environment*,[197] Kenny J held that although Animals Australia had a strong concern for, and wealth of relevant knowledge and expertise in, animal welfare, and had been consulted by the Department on relevant issues, and had standing to bring a proceeding in respect of the general matter, that was not a sufficient interest to attract an obligation to afford procedural fairness to Animals Australia in connection with a decision to grant an exemption under a statutory instrument.

206. Where, contrary to the above authorities, procedural fairness would be owed by reason of its impact on a right, interest or legitimate expectation, it can nevertheless be excluded by a clear statutory intention.[198]

Principles relevant to the application of the principle of apprehended bias

207. Where procedural fairness is owed, the criterion for the determination of the apprehension of bias on the part of a decision-maker is well established. It is whether a fair minded lay-observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question the decision-maker is required to decide.[199]

208. The application of that criterion requires: (1) identification of the factor which it is said might lead a decision-maker to resolve the question other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.[200]

209. The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses the following main categories of case: by interest, by conduct, by association and by possession of extraneous information.[201]

---

197 [2020] FCA 905 at [77].

198 *Kioa* [1985] HCA 81; (1985) 159 CLR 550 at 619 (Brennan J), 632 (Deane J), see Brennan J cited in *Disorganized Developments Pty Ltd v South Australia* [2023] HCA 22; (2023) 280 CLR 515 at [34].

199 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15; (2023) 279 CLR 148 (***QYFM***) at [38] (Kiefel CJ and Gageler J), [67] (Gordon J); *Ebner* [2000] HCA 63; (2000) 205 CLR 337 at [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

200 *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* [2026] HCA 8; (2026) 100 ALJR 489 at [1] (Gageler CJ and Gleeson J), [60] (Gordon J); *QYFM* [2023] HCA 15; (2023) 279 CLR 148 at [38] (Kiefel CJ and Gageler J); *Ebner* [2000] HCA 63; (2000) 205 CLR 337 at [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

201 *Webb v The Queen* [1994] HCA 30; (1994) 181 CLR 41 at 74 (Deane J).

210. The bias rule has a flexible quality that takes into account the nature of the statutory power, the nature of the repository of the power and the circumstances in which the power comes to be exercised.[202] In particular, Courts have acknowledged that the application of the bias rule accommodates the political role of a Minister, such that statements that might evince apprehended bias if made by a judicial officer might not evince bias if made by a Minister. As McHugh J explained in *Hot Holdings Pty Ltd v Creasy*:[203]

> While the test for a reasonable apprehension of bias is the same for administrative and judicial decision-makers, its content may often be different. What is to be expected of a judge in judicial proceedings or a decision-maker in quasi-judicial proceedings will often be different from what is expected of a person making a purely administrative decision. One difference arises when the decision-maker is a Minister who is accountable to the Parliament and the electorate. In *Minister for Immigration and Multicultural Affairs v Jia Legeng*, Gleeson CJ and Gummow J, Hayne J agreeing, said that "[t]here are ... consequences that flow from the circumstance that a power is vested in, and exercised by, a Minister". Their Honours noted that, subject to any contrary indication in the legislative grant of power, a Minister would be entitled to act in accordance with governmental policy when making a decision. Thus, it will ordinarily be very difficult to impute bias or the reasonable apprehension of bias to the decision of a Minister who has considered all applications on their merits but made it clear that preference would be given to applicants who complied with government policy.

211. In *McGovern*,[204] a case about prejudgment in the context of local councillors, Basten JA said (in a passage cited with approval in *Isbester* at [27]): "*[t]he institutional setting being quite different from that of a court, the fair-minded observer will expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers*".[205]

212. The significance of that statement is borne out in the cases that have considered bias allegations against Ministers.

213. In *Minister for Immigration and Multicultural Affairs v Jia Legeng*,[206] the High Court rejected a claim of bias[207] by Mr Jia in circumstances where the Minister cancelled his

---

202 See, e.g., *Kioa* [1985] HCA 81; (1985) 159 CLR 550 at 612-613 (Brennan J); *McGovern v Ku-ring-gai Council* [2008] NSWCA 209; (2008) 72 NSWLR 504 (***McGovern***) at [71] (Basten JA); *Isbester* [2015] HCA 20; (2015) 255 CLR 135 at [23] (Kiefel, Bell, Keane and Nettle JJ).

203 [2002] HCA 51; (2002) 210 CLR 438 at [70].

204 [2008] NSWCA 209; (2008) 72 NSWLR 504.

205 *McGovern* [2008] NSWCA 209; (2008) 72 NSWLR 504 at [80].

206 [2001] HCA 17; (2001) 205 CLR 507 (***Jia***).

207 Reversing the Full Court of the Federal Court of Australia's finding of actual bias in *Jia Le Geng v Minister for Immigration and Multicultural Affairs* [1999] FCA 951; (1999) 93 FCR 556, and also

visa following, among other things, a radio interview in which the Minister had specifically referred to Mr Jia's case, expressed unhappiness with the decision of the Administrative Appeals Tribunal to grant Mr Jia a visa and said: "*I don't believe you are of good character if you've committed significant criminal offences involving penal servitude*". Chief Justice Gleeson and Gummow J said that, where a power is vested in a Minister, the Minister's conduct may need to be evaluated "*in the light of his or her political role, responsibility and accountability*".[208]

214. In *Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources*[209] (***Wilderness Society PJ***), the Court rejected a claim of bias against the Minister which relied, broadly speaking, on the contention that the Government had chosen a less rigorous assessment process (which involved no public consultation) to fit in with the proponent's timetable and because it supported the proposed project.[210] The applicant relied (among other things) on communications between the Department and the proponent. In the course of deciding that apprehended bias in the form of prejudgment had not been established, the Court observed that it was understandable that those who opposed the pulp mill project would be suspicious of the assistance given by officers of the Department to the proponent in its referral under the Act.[211] However the Court said that that suspicion must be seen in the context of a number of facts, including that it was "*departmental practice to assist proponents with referrals and to meet to discuss them*",[212] and that "*as long as the steps required by the [Act] are taken by the Minister, the Australian government is not prevented from having a policy position on the pulp mill project*".[213]

No duty of procedural fairness was owed to ACF

215. In the present case, the Court should find that because ACF was not owed procedural fairness in relation to the decision to approve the NWS Project Extension under s 133

---

rejecting the separate apprehended bias claims raised by way of applications made directly to the High Court under s 75(v) of the Constitution.

208 *Jia* [2001] HCA 17; (2001) 205 CLR 507 at [63] (Gleeson CJ and Gummow J).

209 [2007] FCA 1178; (2007) 96 ALD 655.

210 *Wilderness Society PJ* [2007] FCA 1178; (2007) 96 ALD 655 at [144].

211 *Wilderness Society PJ* [2007] FCA 1178; (2007) 96 ALD 655 at [146].

212 *Wilderness Society PJ* [2007] FCA 1178; (2007) 96 ALD 655 at [147].

213 *Wilderness Society PJ* [2007] FCA 1178; (2007) 96 ALD 655 at [147]. See also *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438 at [20] (Gleeson CJ).

of the Act (consistently with authority and the proper construction of the statute), it was not entitled to a hearing free from the apprehension of bias.

216. The Court here should conclude, as did Branson and Finn JJ in *Wilderness Society FC*, that ACF is not owed procedural fairness because it cannot identify a right or interest that is affected in a direct and immediate way by the decision to approve the taking of a controlled action under s 133.

217. Alternatively, if the Court concludes that ACF is owed a duty of procedural fairness because it is sufficiently affected, it should find that that duty has been excluded by statute.

218. Section 131AA of the Act provides for the Minister to invite comments from the person proposing to take the controlled action/designated proponent, before deciding whether or not to approve under s 133. Under s 131AA(6), the Minister is required to take such comments into account (provided they are relevant) in deciding whether or not to approve the taking of an action under s 133 (and whether to attach conditions under s 134, and the form of those conditions).[214] Section 131AA(7) then provides that:

> This section is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to:
>
> (a) the Minister's decision under s 133 whether or not to approve, for the purposes of a controlling provision, the taking of the action; and
>
> (b) if the decision is to approve, for the purposes of a controlling provision, the taking of the action, and the Minister decides, under section 134, to attach conditions to the approval – the Minister's decision under section 134 to attach those conditions to the approval.

219. Section 131AA(7) provides that only the person taking the proposed action/designated proponent is entitled to procedural fairness in relation to a decision under s 133.

220. That is consistent with s 131A of the Act which permits, but does not require, the Minister to invite public comment before making a decision under s 133.

221. Section 131AA(7) and s 131A are inconsistent with an entity in the position of ACF being owed a duty of procedural fairness (including a hearing free of bias). The better reading is that that is because no duty of procedural fairness is owed. However, if it

[214] Pursuant to s 134(4)(aa) of the Act, the Minister must also consider information provided by the proponent when deciding whether to attach a condition to an approval.

were, those provisions would necessarily have to be read as excluding any such obligation.

222. If the Court accepts either of the above submissions, Ground 5 may be disposed of on that basis. The submissions which follow below assume that the Court does not accept this threshold point.

ACF does not address, let alone satisfy, the tripartite test

Sequencing of the Reconsideration Decision, Reconsideration Reasons and Approval Decision

223. ACF's contention on the sequencing limb of its allegation of apprehended bias boils down to the proposition that, because the Reconsideration Reasons could and should have been provided earlier than they were, that gave rise to a reasonable apprehension that the Department, and therefore the Minister, did not bring an impartial mind to the Approval Decision.

224. The difficulty with this submission is that it does not address, let alone satisfy, the three step test for the application of the principle of apprehended bias.

225. As set out in paragraph 208 above, that test requires: (1) identification of the factor which it is said might lead a decision-maker to resolve the question other than on its legal and factual merits; (2) articulation of the logical connection between that factor and the apprehended deviation from deciding that question on its merits; and (3) assessment of the reasonableness of that apprehension from the perspective of a fair-minded lay observer.

226. ACF does not address its submissions to the satisfaction of that test. One is left trying to guess at how ACF's case might be said to fit the three-step test. Is the alleged delay in the Reconsideration Decision and provision of reasons said to be a factor which might lead the Minister to exercise the power under s 133 other than on its merits? That seems unlikely as the delay did not "*lead*" the Minister to do anything. Is the alleged delay the apprehended deviation? That, however, would leave both the original factor and the logical connection with it unidentified. And the third step cannot be applied in the absence of the first two steps being properly addressed.

227. Instead of identifying a potential source of bias as the starting point of the tripartite test, ACF seeks to draw inferences from facts relating to the sequencing of the Reconsideration Decision, Reconsideration Reasons and the Approval Decision. That

is not an allegation of apprehended bias in the *Ebner* sense. Rather it is an allegation of actual bias by inference. But actual bias cannot be proven by the "*double might*" test that is the established test for apprehended bias. To prove actual bias, it is necessary to demonstrate "*a pre-existing state of mind which disables the decision-maker from undertaking or renders him [or her] unwilling to undertake any or any proper evaluation of the material before him or her which are relevant to the decision to be made*".[215] And while actual bias, which is not alleged, may be proved by inference,[216] the threshold for an inference is probability, not possibility[217] and the standard of proof is affected by the seriousness of the allegation.[218]

Communications between the Department and Woodside

228. ACF's contention in respect of the communications between the Department and Woodside following the proposed approval decision is that Woodside was so "*influential or dominant*" that a reasonable observer would infer that the Department effectively capitulated to Woodside's requests: ACF [250]-[254].

229. While a reasonable apprehension of bias might arise because of the close connection of a decision-maker with a person who is so influential or dominant that a fair-minded person might reasonably apprehend that the decision-maker might not make the decision impartially,[219] that is not what is alleged by ACF.

230. Rather, the effect of ACF's contention is that Woodside was, in fact, so influential or dominant in the course of negotiations that a reasonable observer would apprehend that the Minister was in fact biased. Again, that is not an allegation of apprehended bias sought to be established by the tripartite test. Rather it is a claim of actual bias, which is not alleged. The observations at paragraph 227 apply with equal force to ACF's allegation of bias on this basis.

---

215 *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87 at 104, 106.

216 *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 126, cited in *Jia v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87 at 105.

217 *Carr v Baker* (1936) 36 SR NSW 301 at 306, cited in *Seltsam Pty Ltd v McGuiness* [2000] NSWCA 29; (2000) 49 NSWLR 262 at [86].

218 *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 123 (Wilcox J) and 127 (Burchett J)

219 *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438 at [74] (McHugh J).

ACF relies on distorted narrative to allege bias

231. Even assuming that ACF's reliance on the Department's conduct could be relevantly attributed to the Minister,[220] ACF's allegations of bias depend upon a cherry-picking of relevant facts to produce a distorted narrative. As will be evident from the following sections, when those facts are put in context, no inference of bias arises.

Sequencing of the Reconsideration Decision, Reconsideration Reasons and Approval Decision

232. The timing of the making of the Reconsideration Decision is explained by the following facts.

233. On 22 November 2018, Woodside referred the proposed action to the Minister. The proposal was published on the Department's website and comments from the public and Commonwealth and State Ministers were invited.[221]

234. On 3 May 2019, a delegate determined under s 75 of the Act that the proposed action was a controlled action and that ss 15B and 15C were the controlling provisions.[222]

235. On 8 July 2022, EJA submitted the Reconsideration Request on behalf of ECCQ in respect of the Controlled Action Decision, as well as 18 other similar reconsideration requests in respect of similar controlled action decisions for different projects.[223] On 11 February 2025 and 19 March 2025, there were two further reconsideration requests by other parties in respect of the NWS Project Extension.[224]

236. The delay in dealing with the Reconsideration Request between 8 July 2022 and 8 August 2024 is explained by the evidence of Ms Kylie Calhoun, Branch Head of the Environment Assessments West team, Environment Regulation Division of the Commonwealth Department of Climate Change, Energy, the Environment and Water, and in particular by the following facts:

    236.1 between 8 July 2022 and 12 December 2024, pending the completion of the WA accredited assessment and appeals process, the Reconsideration Request was given a lower priority than other reconsideration requests, as the WA assessment

---

220 Cf. *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51; (2002) 210 CLR 438 at [24] (Gleeson CJ), [27], [44], (Gaudron, Gummow and Hayne JJ) and [72]-[73] (McHugh J).

221 Reasons at [20]; Decision Brief, Document F17 (Referral) at 1-50.

222 Reasons at [22]; Decision Brief, Document F16 (Controlled Action Decision).

223 Affidavit of Kylie Jane Calhoun affirmed 7 April 2026 (***Calhoun Affidavit***) at [17]; Decision Brief, Document F99.

224 Reasons at [33]; Decision Brief, Documents F102 and F104.

and appeals process meant that any final approval decision on the NWS Project Extension was likely to be delayed.[225] Following receipt of the WA appeals outcome, however, the Reconsideration Request was progressed by the Department as a higher priority;[226]

236.2 between 2 June 2023 and 8 August 2024, there was test litigation[227] on foot in respect of two of the 19 reconsideration requests, which were effectively identical. As a consequence, no decisions were made on other reconsideration requests, including the Reconsideration Request, while the Department was awaiting the outcome of the litigation;[228]

236.3 between 8 August 2024 and 17 March 2025, the Department made progress on the remaining reconsideration requests, including the Reconsideration Request ahead of other requests, and provided a reconsideration decision brief package for the Reconsideration Request to the office of Minister Plibersek on 17 March 2025;[229]

236.4 on 28 March 2025, the Prime Minister called an election to be held on 3 May 2025. This caused the Government to go into caretaker mode during which, by convention, no decision could be made on the Reconsideration Request, and the Minister's office returned the reconsideration decision brief package for the Reconsideration Request to the Department;[230] and

236.5 the new Minister was sworn in as the Minister for Environment and Water on 13 May 2025. He was provided with the reconsideration decision brief package for the Reconsideration Request on 16 May 2025 and made the Reconsideration Decision on 20 May 2025.[231]

237. The above facts explain the timing of the Reconsideration Decision.

238. ACF's case then turns on the reasons for the Reconsideration Decision being given after the Approval Decision was made. However, the correct explanation of that sequence of events is as follows.

---

225 Calhoun Affidavit at [26.2] and [41].
226 Calhoun Affidavit at [44].
227 See above at paragraphs 132-138.
228 Calhoun Affidavit at [35].
229 Calhoun Affidavit at [37]-[40].
230 Calhoun Affidavit at [50]-[52].
231 Calhoun Affidavit at [53]-[55].

239. The Approval Decision process was in fact delayed to allow for the Reconsideration Decision to be made, which is why the Reconsideration Decision and proposed approval occurred in quick succession. On receipt of MS 1233, the 30 business day statutory time limit for the making of the Approval Decision recommenced (see above at paragraphs 28-31). This deadline was extended on three occasions to allow for the Reconsideration Request and other requests to be dealt with before the decision whether or not to approve, consistent with the Department's policy.[232] Once the Reconsideration Decision had been made on 20 May 2025, the Minister was able to proceed with the proposed approval on 28 May 2025.

240. As for the delay in the provision of reasons for the Reconsideration Decision, the evidence is that there is no consistent practice of preparing a final statement of reasons at the same time as a decision is made.[233] The Minister was briefed with the draft reasons brief package on 14 July 2025, relatively shortly after EJA on behalf of ACF requested reasons on 28 May 2025.[234] Given the workload of the branch, there is no basis to suggest that this represented deliberate delay by the Department.[235] The Minister then signed the draft reasons, and a letter to EJA enclosing them, on Friday 25 September 2025. They were emailed to EJA by the Department on Monday 29 September 2025.[236] The intervening period between 14 July 2025 and 25 September 2025 is explained by the workload of the Minister's office, with there being 174 Ministerial Decision Briefs either sent to, or actioned by, the Minister in the period between 15 July 2025 and 29 September 2025. While these reasons were not provided to ACF within the statutory timeframe under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), that does not provide any basis for an adverse inference against the Department or Minister given the size and complexity of the NWS Project Extension[237] and in circumstances where Ms Calhoun explains in her affidavit that in the ordinary course, providing a statement of reasons within the statutory timeframe is not always possible.[238]

---

232 Calhoun Affidavit at [16.5]-[16.6]. See also Decision Brief, Documents F109, F110 and F111, in each case comprising a brief to the Minister setting out the reasons for the extension of time.
233 Calhoun Affidavit at [62]-[64].
234 February Bester Affidavit, Exhibit CB-22.
235 Calhoun Affidavit at [10].
236 February Bester Affidavit, Exhibit CB-26.
237 Calhoun Affidavit at [15].
238 Calhoun Affidavit at [64].

241. When those facts are taken into account, there is no basis for an inference that the Reconsideration Decision, or the reasons for it, were withheld or delayed to prevent ACF from seeking to challenge the Reconsideration Decision or to secure the Approval Decision in a timely fashion.

242. That is particularly so given that the Minister made public statements about the NWS Project Extension. The Minister issued a public statement on the proposed approval for the NWS Project Extension on 28 May 2025.[239] The Minister gave press conferences in relation to the project on 29 August 2025, 9 September 2025 and 12 September 2025.[240] There was nothing covert about the process followed by the Minister.

243. Further, given that the Reconsideration Request was in the same terms as that which had been unsuccessfully litigated to the High Court by EJA on behalf of ECCQ in the *ECCQ* cases, there was no apparent reason to expect that these reasons would be relitigated. Particularly because ACF had participated in that process by making submissions in support of each of those reconsideration requests and it would have been reasonable for the Minister to suppose that ACF was aware of the terms of those requests.[241]

Communications between the Department and Woodside

244. ACF makes three assertions about what it alleges would cause a reasonable observer to infer bias from the consultations between Woodside and the Department: the intensity and familiarity of the communications, Woodside's role in amending the conditions and Woodside's success in its bid to change the conditions of approval. The high point of these communications might be thought to be:

    244.1 Woodside's email providing draft proposed conditions 3 and 4 to "*align with the [Department's] goal of delivering a workable approval protecting the national heritage values of Murujuga and permitting the extended operation of the [Karratha Gas Plant] beyond 2030*";[242]

---

239 February Bester Affidavit, Exhibit CB-21.

240 Giunta Affidavit, Exhibits SRG-31 at 424, SRG-32 at 433-434, SRG-33 at 436-437, SRG-34 at 439-443.

241 Letter from ACF to the Minister dated 24 November 2022 re Mt Pleasant reconsideration request; Letter from ACF to the Minister dated 24 November 2022 re Ensham reconsideration request; Letter from ACF to the Minister dated 24 November 2022 re Narrabri reconsideration request; cf. Affidavit of Cecile Bester affirmed 27 February 2026 in relation to standing, Exhibit CB2-5 at 75-317.

242 Decision Brief, Document C4 at 1.

244.2 the text to Ms Parry: "*Rachel – based on our very quick read, there are two issues that fit the "allergic reaction" definition that you described recently*";[243]

244.3 the text to Ms Parry stating: "*[i]f those mark-ups are acceptable and there are no other changes, the conditions would be implementable*";[244] and

244.4 the post-decision: "*Thanks Rachel! We got there!*" exchange.[245]

245. While those communications lack formality and suggest a familiarity between the human beings involved, they in no way suggest that the Minister's decision-making process miscarried, particularly when the relevant chronology of events is understood.

246. At the level of principle, the intensity and familiarity of the consultation process is not a fact that, of itself, gives rise to any inference of bias. To the contrary, *Wilderness Society PJ* accepted that it may be departmental practice to meet and confer with proponents.[246] In *City of Burnside*, the inference of bias arose from covert and deceptive conduct, not from the mere fact of consultation (cf. ACF [229]).[247] Nor should the fact of the proponent proposing the amendments nor the fact that it has some success support any inference of bias.

247. At the level of fact, when the evidence of the consultation is considered in more comprehensive detail than that identified by ACF in its submissions, no inference of bias arises on any of the bases posited by ACF.

248. The Act requires consultation with respect to conditions. Section 131AA requires the Minister, before making a decision under s 133, to invite comments from the person proposing to take the controlled action or the designated proponent (if they are different persons) and to take those comments into account. The Minister is also required by s 134(4)(aa) to consider information provided by the person proposing to take the action.[248] Indeed certain conditions require the consent of the approval holder: s 134(3A).

---

243 Affidavit of Inshani Sappideen Ward affirmed on 30 March 2026 (***Ward Affidavit***), Exhibit IW-35 at 231.

244 Ward Affidavit, Exhibit IW-38 at 255.

245 Ward Affidavit, Exhibit IW-56 at 429.

246 *Wilderness Society PJ* [2007] FCA 1178; (2007) 96 ALD 655 at [147].

247 *R v South Australian Planning Commission; Ex parte City of Burnside* (1986) 45 SASR 487 at 504 (Olsson J).

248 Albeit that a failure to consider that information does not invalidate a decision about attaching a condition: s 134(5).

249. As a matter of fact, the evidence of Ms Calhoun is that: "*it is very common for government liaison officers employed by proponents to communicate frequently with Departmental officials during the consultation period, including by text message, calls and emails*": Calhoun Affidavit at [70]. It is unsurprising that, for a "*large and complex*" project such as the NWS Project Extension, the consultation may be substantial.[249] That is borne out by the evidence in this proceeding.

250. The Department communicated the proposed approval to Woodside on 28 May 2025.[250]

251. On 28 May 2025, 30 May 2025 and 3 June 2025, Woodside and the Department met to discuss the conditions.[251]

252. On 4 June 2025, Woodside emailed the Department to provide informal feedback on the proposed conditions.[252] In that email, Woodside raised concerns in relation to proposed conditions 3 and 4. An internal departmental draft outline for discussion circulated that evening indicated why the Department had framed proposed condition 3 as it had and the nature of the consultation that was required in the circumstances.[253] The outline stated that:

> To enable a timely decision and to ensure that the risk of impact to rock art and NHP values was managed to an acceptable level, the department chose to limit emissions from the action.
>
> We realise that Woodside are the experts in their business, and without the department having the relevant information at hand, the conditions are encompassing (i.e. capturing all emissions).
>
> The conditions may not, for a variety of reasons, be possible to achieve or relevant to the action.
>
> The proposed conditions put forward are an invitation to Woodside to demonstrate to the department:
>
> > o What emissions are relevant/not relevant to the action and impacts to rock art (for example, potentially particulate matter)
> >
> > o For those KGP emissions considered impacting to rock art, what minimal level is possible (from a safety, operational, monitoring perspective)
> >
> > o Following provision of the above information, condition 3 can be made specific to emission levels and to the project. Department will need to assess if the levels are acceptable.

249 Calhoun Affidavit at [15].
250 Reasons at [41], [43]; Calhoun Affidavit at [69]; Ward Affidavit, Exhibit IW-8 at 45.
251 Ward Affidavit, Exhibits IW-9 at 63, IW-10 at 66; Decision Brief, Document C1.
252 Decision Brief, Document C1.
253 Ward Affidavit, Exhibit IW-12 / Bundle of unredacted Ward Affidavit Annexures at 8.

> o Refinements to Condition 4 (monitoring requirements) would naturally follow condition 3. And the department appreciates the response provided by Woodside to commence this conversation.

253. That outline demonstrates that proposed condition 3 had been drafted very broadly, with a view to it being refined in consultation.

254. Consistently with this, what then followed was a process of consultation in which Woodside proposed changes to the conditions (the original form of which was rejected) and was required to provide evidence in support of its proposed approach.

255. On 10 June 2025, Woodside emailed the Department providing further informal suggested drafting changes to proposed conditions 3 and 4 and providing information.[254] The suggested drafting changes provided for the conditions to align with MS 1233, including amending proposed conditions 3 and 4 to limit the conditions to "*air emissions from the Action that have an adverse impact accelerating the weathering of rock art … beyond natural rates*", consistent with Condition 3-1 of MS 1233.

256. On 12 June 2025, the Department responded to Woodside's informal feedback in a document titled "*Conditions consultation June 2025 – North West Shelf Project Extension*" and requested further information about specified matters.[255]

257. On 23 June 2025, Woodside emailed the Department attaching its formal submission in response to the Minister's invitation to comment under s 131AA of the Act.[256] Woodside's formal submission outlined its position that air emissions are adequately regulated under MS 1233, and no additional precautionary measures were necessary or appropriate beyond those imposed by MS 1233.[257]

258. On 3 July 2025, the Department emailed Woodside, stating:[258]

> Thanks for providing the supporting information provided by Woodside last week, it has been useful to further refining our thinking around the conditions for the NWS Project Extension. To help inform the conditions, we have some further questions around the information provided. Outstanding are major concerns around NOx and VOCs emissions and some questions around monitoring as outlined below … .

259. On 7 July 2025, Woodside emailed the Department responding to questions in the email received from the Department on 3 July.[259]

---

254 Decision Brief, Documents C4 and C5.
255 Decision Brief, Document C11; Ward Affidavit, Exhibit IW-17 at 99.
256 Decision Brief, Documents C7, C8 and C9; Ward Affidavit, Exhibit IW-20 at 137.
257 Decision Brief, Document C9 at [13], [30] and [36]-[37].
258 Ward Affidavit, Exhibit IW-26 at 176.
259 Ward Affidavit, Exhibit IW-26 at 176-178.

260. Between 9 and 25 July 2025, internal Departmental emails show the Department seeking advice from subject matter experts and from the Department's conditions team in relation to the proposed revisions to the draft conditions.[260] The Department's consolidated response to Woodside's proposed changes as at 23 July 2025 is captured in a table identifying the proposed conditions, Woodside's proposed amendments, and the Department's response to Woodside's position.[261]

261. On 25 July 2025, Woodside and the Department had a further meeting. The Department's talking points prepared ahead of the meeting[262] summarise consultation that had taken place between Woodside and the Department, and record that, in considering changes to the proposed conditions, the "*department is balancing how the risk of irreversible impact to the rock art caused by industrial emissions is managed within the scope of the regulatory framework and the practical possibilities and limitations outlined in Woodside's submission*".[263]

262. On 29 July 2025, the Department emailed Woodside requesting further details regarding "*NOx*" (nitric oxide and nitrogen dioxide) reduction and emissions limits.[264]

263. On 31 July 2025, Woodside provided its response.[265]

264. On 1 August 2025, an internal departmental email was sent attaching an update on the NWS Project Extension, which summarised the consultation that had taken place to date, and identified the manner in which proposed conditions 3 and 4 would be redrafted.[266] In particular, condition 3 was proposed to be redrafted from a blanket limit on all emissions into four separate conditions specific to each type of emission which

---

260 Giunta Affidavit, Exhibit SRG-21 at 234-268 / Bundle of unredacted Giunta Affidavit Annexures at 185; Decision Brief, Document E16 (Request to Conditions Writing Team); Giunta Affidavit, Exhibit SRG-8 at 71-109 / Bundle of unredacted Giunta Affidavit Annexures at 57-95; Decision Brief, Document E17 (Response from Conditions Writing Team); Giunta Affidavit, Exhibit SRG-27 at 327-328 / Bundle of unredacted Giunta Affidavit Annexures at 248-249; Giunta Affidavit, Exhibit SRG-12 at 159-160 / Bundle of unredacted Giunta Affidavit Annexures at 125; Giunta Affidavit, Exhibit SRG-23 at 276-278 / Bundle of unredacted Giunta Affidavit Annexures at 22-2275; Decision Brief, Document E18 (ECAS Advice); Decision Brief, Document E19 (Response from Conditions Writing Team); Giunta Affidavit, Exhibit SRG-15 at 169-172 / Bundle of unredacted Giunta Affidavit Annexures at 129-132.

261 Ward Affidavit, Exhibit IW-29 at 189 / Bundle of unredacted Ward Affidavit Annexures at unredacted at 11-15).

262 Ward Affidavit, Exhibit IW-30 at 196 / Bundle of unredacted Ward Affidavit Annexures at 16 (email only).

263 Ward Affidavit, Exhibit IW-30 at 197.

264 Ward Affidavit, Exhibit IW-31 at 201-202.

265 Ward Affidavit, Exhibit IW-31 at 200-201.

266 Ward Affidavit, Exhibit IW-32 at 204-207.

potentially had an impact on rock art. Proposed condition 4 was amended to remove the detection limit and align with Western Australian requirements.

265. On 11 August 2025, the Department emailed Woodside a draft final decision notice.[267] The email stated: "*[t]hank you for the additional information that has been provided and the discussions over the last few weeks. For your information, please find attached the Decision Notice that will be provided to the Minister for his consideration*".

266. On 12 August 2025, Woodside emailed the Department with concerns that a number of the conditions were not implementable as currently drafted, and providing potential drafting solutions to meet the intent of those conditions.[268]

267. On 20 August 2025, Woodside emailed the Department raising concerns with proposed conditions 8 and 10, contending that condition 8 was not supported by scientific evidence and that continuous emissions monitoring on all point sources by 30 June 2030 was not feasible.[269]

268. On 24 August 2025, an internal departmental email was sent attaching a table recording Woodside's position on the proposed conditions and the Department's response to Woodside's position.[270] The Department's response records the reasons for the amendment of the conditions.

269. Later that day, the Department sent an email to Woodside attaching the revised final decision notice, which had been updated with consideration of the comments provided by Woodside on 20 August 2025.[271]

270. On 26 August 2025, Woodside emailed the Department stating that the revisions had not addressed some of the issues raised about implementation and in some cases had made the issues worse, and provided further suggested mark-ups.[272]

271. On 5 September 2025, the Department emailed Woodside attaching the conditions that formed part of the final decision package for the Minister. The Department thanked Woodside for "*your ongoing engagement and previous advice on implementability of*

---

267 Ward Affidavit, Exhibit IW-34 at 211.
268 Ward Affidavit, Exhibit IW-36 at 233-235.
269 Decision Brief, Document C16.
270 Ward Affidavit, Exhibit IW-43 at 296.
271 Ward Affidavit, Exhibit IW-44 at 305; Decision Brief, Document C17.
272 Ward Affidavit, Exhibit IW-46 at 334-335.

the conditions and the clarifications of the definitions" and asking "*if there are any factual corrections that need to be made*".[273]

272. On 6 September 2025, Woodside emailed the Department raising minor factual corrections and concerns about proposed condition 5.[274]

273. On 9 September 2025, the Department provided the Decision Brief to the Minister. On 12 September 2025, the Minister signed the Decision Brief, making the Approval Decision.

274. The chronology set out above shows that there was extensive communication between the Department and Woodside about the content of the conditions. But there is nothing in the fact of those communications, or their content, to sustain an allegation of apprehended, let alone actual, bias. Rather, the communications (including internal Departmental communications) explain why proposed conditions 3 and 4 were originally drafted as they were, why the Department was open to changing those conditions and what supporting information was required from Woodside to support the changes. The communications also show that the Department rigorously assessed the informal and formal feedback from Woodside, sought further information from Woodside and subject matter experts and proposed changes to the conditions while remaining aware of the statutory task the Minister was required to perform. The communications also show that Woodside initially proposed that the conditions should be amended to reflect the conditions in MS 1233,[275] and that Woodside was not successful in achieving that outcome, with the conditions ultimately imposed being more onerous than the conditions in MS 1233.[276] It cannot be said that the outcome was one which was dictated or forced by Woodside or might be perceived to be. Nor could there be any apprehension of bias on the Minister's part, including in light of the Minister's clear understanding of his statutory task.[277] There was nothing improper about the fact that that outcome was reached by consultation, as that is precisely what is contemplated by the Act (cf. ACF [254]).

273 Ward Affidavit, Exhibit IW-49 at 366-367.
274 Ward Affidavit, Exhibit IW-52 at 395.
275 Decision Brief, Documents C4 and C5.
276 See MS 1233 at Decision Brief, Document F13 at conditions 3-1 to 3-13, cf. Conditions 5-8 and 11.
277 Reasons at [298].

Conclusion on Ground 5

275. Ground 5 should be dismissed.

I. CONCLUSION

276. The Court should dismiss ACF’s Further Amended Originating Application with costs.

Dated: 9 June 2026

D G CLOTHIER

F I GORDON

J D WATSON

G R CLOUGH