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FEDERAL COURT OF AUSTRALIA **VID1356/2025**
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

AUSTRALIAN CONSERVATION FOUNDATION INC
Applicant

MINISTER FOR THE ENVIRONMENT AND WATER
First Respondent

WOODSIDE ENERGY LTD (ACN 005 482 986)
Second Respondent

FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS

PART A — INTRODUCTION

1. This is an application for judicial review of the decision made by the Minister for the Environment and Water (the **Minister**) to approve the taking of an action by the second respondent (the **proponent**, or **Woodside**) under ss 130(1) and 133(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (the **Approval Decision**). The proposed action is the North West Shelf Extension Project (**NWS Extension Project**), which would extend the operation of an existing facility currently expected to run until around 2030 using existing sources of gas, as well as expand that facility's operation so that it can process gas from other offshore areas near Western Australia.

2. Each of the grounds of review lack merit and the application should be dismissed. In summary:

   2.1 **Ground 1**: The Minister was permitted to take into account the potential economic benefits of the Browse to North West Shelf (**NWS**) development, if that

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project were approved, when considering the category of "*economic and social matters*" pursuant to s 136(1)(b) of the EPBC Act.

2.2 **Grounds 2 and 3**: The Minister understood the impacts of air emissions on rock art, including the impacts that could arise if the project secured a source of third-party gas, and imposed conditions that provided for caps on all relevant air emissions regardless of the sources or composition of the inputs.

2.3 **Ground 4**: The Minister did not reason as though s 527E(1)(b) of the EPBC Act imports a numerical or arithmetical test and, in any event, the proper construction of that provision does not preclude such an approach.

2.4 **Ground 5**: For the reasons advanced by the proponent, the allegations of bias do not engage with the *Ebner* test[1] and fail on their facts.

3. Given the proponent is capably represented and has filed detailed submissions dated 9 June 2026 (**PS**) opposing the grant of relief, the first respondent has endeavoured to limit his submissions so as to avoid duplication.

PART B — BACKGROUND

4. The proponent has addressed the procedural history of the assessment and decision-making process (PS [22]-[42]) and the statutory scheme (PS [10]-[20]). It is not necessary to add to those summaries. The first respondent addresses any relevant construction issues in the course of submissions below.

5. In these submissions, the attachment numbers reflect the attachments to the Approval Decision brief signed by the Minister on 12 September 2025.[2] The Approval Decision brief incorporates an earlier brief signed 28 May 2025 and its attachments bundled together as "*Attachment F: Copy of proposed approval decision submission package*".[3]

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1 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ, Callinan J agreeing).

2 An index to the Approval Decision Brief was prepared in accordance with Order 1 of the Orders of Button J dated 17 November 2025 and served on the parties.

3 The page numbers in the footnotes refer to the internal document page numbering; these page numbers can be updated in annotated submissions once a Court Book is filed if that is convenient.

6. No issue is taken with the applicant's standing: Applicant's Submissions dated 20 April 2026 (**AS**) at [5]-[6].

PART C — SUBMISSIONS

C-1 Ground 1: Considering benefits of unapproved project

7. The applicant alleges that the Minister erred in taking into account the economic benefits of a separate action, being the Browse to NWS project: AS [182]-[192]. The applicant's argument involves a misconstruction of the Minister's reasons and the imposition of constraints that do not appear in the language of s 136(1)(b) of the EPBC Act.

8. The Minister's reasons make clear that he was aware that the Browse to NWS development was a separate project, which was not approved and may never be approved: see in particular the Minister's reasons for the Approval Decision (**Approval Reasons**) at [17], [249], [251]. The Minister did not reason as if the approval of the separate project "were a *fait accompli*" (AS [191]) or "*prejudge*" the outcome (AS [192]). Rather, the caveated and conditional language in these paragraphs makes clear that the Minister was noting the potential benefits of the NWS Extension Project plus the Browse to NWS project, if that latter project were approved.

9. The applicant focusses on the Minister's reasoning at [250(c)] and [251] (AS [183]), but immediately prior to those impugned paragraphs, the Minister said at [249]:

> *I note the proponent provided economic information under two scenarios: the current operation of NWS Project processing NWS resources only; and the economic impacts from developing the Browse fields (EPBC 2018-8319 under assessment) and processing via North West Shelf Project infrastructure and the North West Shelf Project Extension.*

10. The Minister then stated that "*the proposed action would result in significant economic benefits to the regional, State and National communities*", before setting out several matters under [250(a)-(c)] and [251]. The material before the Minister regarding economic matters, which supported the statements in each of those impugned paragraphs, clearly distinguishes between the two relevant scenarios (in which the NWS Extension Project processed only existing approved resources, or, where the project

secured a new source of gas from the Browse to NWS development): see the summary of the underlying material in PS [52]-[53].

11. Moreover, reading the Minister's reasons as a whole, the Minister evidently understood that the factual premise of the NWS Extension Project was that, in order to be viable for its long term operation, it would need to process gas from third-party sources after 2030, where one of those potential sources was the Browse to NWS project:[4] see also PS [47]. This interdependency was an inherent aspect of the action to which the decision related. For that reason, it was entirely logical for the Minister to refer to any future economic benefits by reference to these other sources of gas, given those sources are in effect pre-requisites for the project to proceed in the long term.

12. For example, the Minister observed that "*[w]ithout new gas and fluids sources, the existing action (and associated emissions and discharges) would be expected to decline over the next 10 years as the [North West Shelf Joint Venture] NWSJV fields deplete*".[5] The Minister was conscious that the NWSJV resources are expected to run out by around 2030.[6] In the section of the reasons dealing with economic matters, the Minister referred to 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] KGP*".[7] More generally, the impacts assessed by the Minister implicitly assume that new sources of gas will be available, including third-party sources (for otherwise there would be no emissions after 2030): cf AS [148]. Similarly, the conditions assume that third-party gas will be processed, because otherwise the caps on air emissions beyond 2030 would be meaningless.

13. Accordingly, there was plainly a logical basis for the Minister to reason that the facility would not operate beyond 2030 without a new source of gas, that one potential new

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4 In addition to the Browse to NWS project, there were other third-party sources which were not able to be identified at the time of referral: see Attachment F15 at p 5: "*the proponent has stated that the development of [the other] gas fields cannot be referred or assessed at this time because the commercial arrangements to identify and agree the relevant gas field sources are not complete*".

5 Approval Reasons at [15].

6 Approval Reasons at [7], [15], [158].

7 Approval Reasons at [252].

source of gas was the Browse to NWS project, and that there could be future economic benefits in that scenario (as well as future impacts).

14. In that context, the construction question that arises is whether the Minister was permitted to take into account the economic benefits of the NWS Extension project and the potential economic benefits of the Browse to NWS project if that project were approved. That requires the applicant to demonstrate that the potential economic benefits contributed by an unapproved project was a mandatory irrelevant consideration.

15. There is no basis for such an implication in the EPBC Act. As the proponent's submissions explain, the text of s 136(1)(b) is not limited: PS [54]-[58]. The case law regarding "*economic and social matters*" indicates the breadth of those terms and the latitude given to the Minister under s 136(1)(b): PS [55]. Section 136(1)(b) marks out the "*broad categories of consideration to which the Minister was required to turn his mind*"[8] but allows the Minister latitude to determine what matters within that category might require consideration.

16. None of the points raised by the applicant provide a basis to depart from that construction and interpret that phrase more narrowly.

17. In a general sense, it can be accepted that the referral and assessment stages erected by Part 7 and Part 8 of the EPBC Act contemplate actions being assessed on a "*project-by-project*" basis, by reason of the definition of "*action*" in s 523 of the Act: see AS [186]-[187]. Each of those stages is concerned with the identification and assessment of *impacts* rather than *benefits*: see especially ss 75(2)(a) and (b), s 87 (read with s 84). For that reason, the general scheme in Parts 7 and 8, which concern identifying an action and its impacts, does not answer the question whether the Minister is permitted to take into account broader matters when he turns to make a decision under Part 9 of the EPBC Act and, in particular, when he applies s 136(1)(b) according to its terms.

18. Further, there is no "*slanted approach*": AS [190]. As the proponent says at PS [74], the language used in the EPBC Act that governs the predictive exercise required in

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8 *Tarkine National Coalition Inc v Minister for the Environment* (2015) 233 FCR 254 (***Tarkine FC***) at [25] (Jessup J, Kenny J agreeing).

relation to impacts has no resemblance to the wide language in s 136(1)(b). The legislature can be taken to have chosen that differentiated language advisedly. The considerations in s 136(1)(a) ("*impacts*") and s 136(1)(b) ("*economic and social matters*") are not two sides of the same coin, which will always weigh in different directions. The applicant's argument about weighing at AS [190] incorrectly assumes, contrary to the language of the EPBC Act, that s 136(1)(b) will inevitably involve economic benefits rather than economic impacts. The case law makes clear that both negative and positive economic and social matters are capable of falling within s 136(1)(b);[9] see also PS [58].[10]

19. Section 136(5) of the EPBC Act does not assist the applicant: cf AS [184]. The "*category*" of economic matters was clearly required to be taken into account, and the debate is instead whether the potential economic benefits of another project are properly within that category.

20. Finally, the provisions concerning referral of larger actions point against, not in favour, of the applicant's argument that the circumstances relating to Browse to NWS project are an irrelevant consideration under the scheme of the EPBC Act: cf AS [188]. As the proponent explains at PS [69], the delegate assessed whether s 74A applied to the action and decided to accept the referral for this project even as a component of a larger action under s 74A(1). The purpose of s 74A is to engage the Minister in the question of "*whether there is in reality a larger action*" and then having considered the matter whether "*it is nevertheless appropriate for part of the [larger] action to proceed for consideration under s 75*".[11] Once the Minister has engaged in that task and exercised his discretion under s 74A(1) to allow part of the action to proceed for consideration under s 75, it would be surprising if the Minister were not permitted to take into account matters regarding that larger action at later stages of the approval (especially where the decision under s 74A(1) is not challenged).

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9 See *Minister for the Environment v Sharma* (2022) 291 FCR 311 (***Sharma***) at [87] (Allsop CJ), [576] and [592] (Beach J).

10 For example, in the FARA proceedings it advances an argument based upon adverse economic consequences (which should be rejected for the reasons outlined in the Minister's submission in that case).

11 *The Wilderness Society (Tasmania) Inc v Minister for the Environment* (2019) 275 FCR 287 at [180] (Mortimer J).

21. For these reasons, the phrase "*economic and social matters*" is of sufficient width that it entitles the Minister to consider the potential economic benefits of an unapproved project in the manner he saw fit. And in the context of this project, it was wholly logical for the Minister to consider the economic benefits of the NWS Extension Project if that project secures a third-party gas source (such as the Browse to NWS project).

C-2 Grounds 2 and 3: Indeterminacy relating to composition of emissions

22. Each of grounds 2 and 3 focus on the fact that an aspect of the NWS Extension Project is that the proposal involves new sources of feed gas, which the applicant contends means a change in the composition of emissions: AS [193]-[206]. The applicant puts the complaint in two ways: ground 2 alleges that the Minister's approval "*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 composition and resulting air emissions*", while ground 3 alleges that the Minister had no rational basis for finding the conditions of approval would mean the impacts are acceptable. The applicant's submissions do not address the grounds separately; the Minister adopts the same approach.

23. In *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water,*[12] similar arguments about indeterminacy were advanced (and rejected) in relation to conditions that were said to result in a deferral of the substantive task of approval or produce uncertainty.[13] In that case, the conditions set up a process for later approval of the offsets strategy. Justices Jackson and Kennett observed, in remarks that are apt here, given the scope and complexity of the project:[14]

> *Arguments of the kind raised here point to a tension between what appears (from the text of ss 130 and 133) to be a requirement for a yes or no answer to be given to a proposed action and the scope and complexity of some of the actions requiring approval under the EPBC Act. Attempting to break a large and long term project into smaller components, and seek approval under the EPBC Act for each component as it arises, has obvious problems. The imposition of conditions requiring monitoring, review and the submission of plans for approval — in effect providing for ongoing supervision of the proposed action as it unfolds — is a*

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12 (2023) 299 FCR 236 (***Gelorup FC***).

13 See *Gelorup FC* at [43]-[44] (Jackson and Kennett JJ).

14 *Gelorup FC* at [52]. See also the cases discussed at PS [95]-[97].

mechanism by which proponents and decision-makers seek to manage that tension.

24. Justices Jackson and Kennett proceeded to discuss three circumstances in which the indeterminacy of a condition, attached to a purported approval under s 133 of the EPBC Act, could lead to the approval being set aside on judicial review.[15] The applicant appears to rely on the second[16] and third pathways,[17] corresponding to their second and third grounds.

25. There is overlap between these pathways, given the link between the assessment of impacts and the imposition of conditions. In *Gelorup FC*, Jackson and Kennett JJ found that "*a necessary step in the decision-making process is an assessment of whether those impacts are acceptable in the light of the benefits that the proposed action may bring. If the decision-maker considers that the impacts are not acceptable, the next question for the decision-maker must be whether conditions can be devised that will result in the impacts being acceptable (by limiting or reducing those impacts or, possibly, by bringing about a benefit that offsets them) and what those conditions are*."[18] In the context of these remarks, on which the applicant relies, it is unclear what the applicant means by "*collapsing the distinction drawn by the EPBC Act between an 'action' on the one hand and 'conditions' attaching to it on the other*": AS [201].[19]

26. Turning to the grounds here, the applicant's argument again relies on an incorrect reading of the Minister's reasons. *First*, the applicant overstates the significance to the Minister's reasons of the potential changes in quantity and composition of third-party gas. *Secondly*, the applicant downplays how the Minister considered that the Western Australian and Commonwealth conditions would operate together to manage the uncertainty associated with processing any new sources of gas.

27. The proper construction of the Minister's reasons is that he:

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15 See *Gelorup FC* at [55]ff.
16 See *Gelorup FC* at [57]-[61], in broad terms, indeterminacy in the scope of an action.
17 See *Gelorup FC* at [62]-[66], in broad terms, irrationality in imposing conditions.
18 *Gelorup FC* at [64].
19 See also *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at [63] (Lander and Moore JJ) regarding the relationship between the approval and conditions.

27.1 identified that one aspect of the impacts arising from air emissions was some uncertainty associated with processing new sources of gas (see paragraphs 29-34 below); and

27.2 concluded that the air emissions conditions, and related conditions, would appropriately manage that uncertainty (see paragraphs 35-42 below).

28. This reasoning pathway was entirely orthodox. In short, the Minister found that the impacts to national heritage values from air emissions were not acceptable, but that the conditions he had decided to impose would mean the impact was acceptable.

29. In making findings of fact regarding impacts, the Minister 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*".[20] The Minister found "*sufficient scientific evidence to conclude that areas of the Burrup Peninsula have been exposed to industrial emissions capable of accelerating rock art weathering*".[21]

30. The Minister correctly identified the impacts of the proposed action as including changes in composition of emissions.[22] In this part of the reasons, the Minister "*agree[d] with the department that the [Environmental Review Document[23]] does not provide information to verify the proponent's claims and that the degree of emissions similarity or difference is unknown for third party gas providers*".[24] Contrary to AS [196], this was not an acceptance that the assessment of the difference between current air emissions and potential emissions was impossible, and nor is it the end of the Minister's relevant reasoning.

31. The Minister went on to note that the absence of information about the composition of emissions had caused the WA Environmental Protection Authority (**EPA**) to impose caps on air emissions.[25] Further, he noted that the Air Quality Management Plan (required by the WA conditions) "*describes a process to assess each potential third*

20 Approval Reasons at [102].
21 Approval Reasons at [104].
22 Approval Reasons at [105]-[110]. See also [74(b)(ii)-(iii)].
23 Being Attachment F28 to the Approval Decision Brief.
24 Approval Reasons at [106].
25 Approval Reasons at [110].

party source to be processed by the facility",[26] and later found that this plan "*describes the process the proponent will undertake when assessing each potential new third-party gas source to be processed by the facility to identify any changes that may impact the character of existing emissions and review existing approvals to identify additional requirements*".[27] The Minister agreed "*with the concerns, described in the [WA EPA] Assessment Report, about the effectiveness of the listed measures proposed by the proponent in the ERD and note that the WA EPA recommended significant revisions to the [Air Quality Management Plan] AQMP in the draft conditions*".[28] The Minister later found that "*I consider that there is not enough evidence to demonstrate that the future implementation of the AQMP will be adequate to manage potential impacts, given the uncertainty around causes and pathways*".[29]

32. Against that background, the Minister summarised the impacts of air emissions, "*based on the available evidence and noting the gaps in information that prevent a more complete understanding of the impact*" as including that "*the emissions of the proposed action are likely to have an impact on the NHP. The ongoing production of emissions over 45 years will apply pressure on the rock art of Murujuga, as the emissions will be produced over an area which encompasses the entire area of the NHP*".[30] The Minister concluded "*over the lifetime of the project that this impact could cause degradation, damage, notable alteration, modification, obscuring, or diminishing of the values of the National Heritage Place because the petroglyphs of Murujuga could be degraded to a level that would significantly impact the values of the NHP across Murujuga*".[31]

33. Pausing here, there is no doubt that the Minister was sufficiently appraised of the impacts of air emissions on rock art that could arise if the project secured a source of third-party gas. The applicant does not suggest that the impacts would have been more severe if the sources of third-party gas were identified with more precision; indeed, the applicant does not identify any error at all in the Minister's assessment of impacts. Like in *Gelorup FC*, there was no "*indeterminacy in the scope of the 'action'*"[32] that is the

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26 Approval Reasons at [107].

27 Approval Reasons at [126]. This appears to be a reference to the *3.1.3 Opportunity Management Process*" identified at p 8 of Attachment F61.

28 Approval Reasons at [128].

29 Approval Reasons at [148].

30 Approval Reasons at [132](a).

31 Approval Reasons at [132](b).

32 *Gelorup FC* at [61].

subject of the approval decision. The fact the Minister acknowledged that the quantity and composition of future third-party feed gas was unknown did not prevent him from assessing the impacts and did not render the proposed action "*fatally indeterminate*": cf AS [196]-[198].

34. Moreover, as explained above, it was logical for the Minister to reason that the facility would not operate beyond 2030 without a new source of gas, and it was therefore logical to assess the impacts on the basis that one or more new source of gas would be obtained: cf AS [199].

35. Having correctly identified the impacts, the Minister proceeded to impose conditions on a basis that included some uncertainty about the composition of emissions. The Minister expressly acknowledged that "*the proposed 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*".[33] The Minister was nevertheless able to identify the basis on which he would impose conditions, which the applicant does not impugn:[34]

- *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 NHP to occur.*

36. The key conditions are Conditions 4 to 7 of the Minister's approval,[35] some of which required compliance with Conditions 3-1 to 3-13 of the WA approval[36] (as to which see

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33 Approval Reasons at [173].

34 Approval Reasons at [176].

35 Condition 8 is also relevant as it provides for limits on CO (carbon monoxide), CO_2 (carbon dioxide) CH_4 (methane) and PM (particulate matter). The Minister noted at [212] that "the role of COx and CH_4 and other acid forming emissions are still being studied under the MRAMP to determine the extent of their potential impact on rock art". That is, there is less certainty as to whether greenhouse gas emissions have any impact on the rock art, but the Minister nevertheless considered Condition 8 was necessary or convenient for managing the identified impacts.

36 The conditions attached to the WA approval are in Ministerial Statement 1233 (**MS 1233**) dated 12 December 2024, being Attachment F13.

ss 134(4)(a) and 134(3)(c)). It is necessary to focus on the conditions in some detail, because the applicant's analysis is again divorced from the facts: there is no concrete identification of how more precision as to the sources of feed gas have any consequences in terms of the Minister's pathway of reasoning in relation to conditions. It is convenient to address the WA conditions first.

37. Conditions 3-1 to 3-3 of the WA approval[37] are described as an outcome-based rule that requires that the proponent achieves the "*Air Quality Outcome*".[38] That outcome is to ensure that no air emissions from the proposal have an adverse impact accelerating the weathering of rock art of Murujuga beyond natural rates. This is the core test under the WA approval: it looks to the ultimate effect on rock art, rather than the quantity or content of air emissions. The "*Air Quality Outcome*" applies regardless of the source of gas; the WA conditions do not define "*air emissions*" and so any future air emissions are captured.

38. Conditions 3-4 to 3-6 then provide a detailed framework for an "*Air Quality Management Plan*", which provides how the proponent must implement emissions reductions strategies, monitoring systems and response actions. Condition 3-5 describes what the "*Air Quality Management Plan*" must contain, and include substantive features that deal with future changes in the quantity or quality of air emissions, such as:

38.1 requirements for reducing NO_x emissions to 3,065 tpa by 2030 (Condition 3-5(1)(e)) and reducing VOCs emissions to 10,557 tpa by 2030 (Condition 3-5(1)(f));

38.2 requirements for continuous monitoring on every LNG train (Condition 3-5(4)) and for monitoring and reporting on air emissions annually (Condition 3-5(8);

38.3 requirements for specifying trigger criteria (criteria which warn about approach of threshold criteria) and threshold criteria (criteria which demonstrate the Air Quality Outcome is being achieved) (Condition 3-5(10)); and

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37 See MS 1233, Attachment F13.

38 There is an erroneous reference in the Approval Reasons at [141] to the "*Air Quality <u>Objective</u>*"; this is evidently intended to be a reference to the "*Air Quality <u>Outcome</u>*" described in Condition 3 of MS 1233.

38.4 a prohibition on exceeding those threshold criteria (Condition 3-8) and a mechanism for reporting exceedance of threshold criteria within 48 hours (Condition 3-7).

39. Condition 4 of the Minister's approval requires compliance with WA Conditions 3-1 to 3-13, which as just explained, require the achievement of an "*Air Quality Outcome*" and the implementation of the "*Air Quality Management Plan*".[39] Condition 4 of the Minister's approval also requires the proponent to provide copies of reports or a revised version of the "*Air Quality Management Plan*" to the department and that the plan be made publicly available.[40] Conditions 5 to 7 of the Minister's approval then provide for air quality limits (or fixed caps) of certain emissions, which are stricter than those limits on NO_x and VOCs in the WA approval (see paragraph 38.1 above):[41]

39.1 Condition 5 provides for a limit on NO_x (nitrogen oxides). In effect, this provides for a reduction of NO_x of 60% by 2030 and then a further 5% every 5 years from the end of 2030 until January 2061, being a total reduction of 90% of NO_x emissions from baseline by 2061.[42]

39.2 Condition 6 provides for a limit on SO_2 (sulphur dioxide). This condition provides that current levels of SO_2 are not exceeded even if a new resource is found, with the cap being 100 tonnes of SO_2 per year.[43]

39.3 Condition 7 provides for a cap on limits on VOCs (volatile organic compounds). In effect, this provides for a reduction of 40% of the current total VOCs by 2030 and continued reduction by further 5% every 5 years until January 2061; this results in a total 70% reduction in VOCs by 2061.[44]

40. These hard caps on emissions apply regardless of the sources of feed gas ("*<u>where</u> the third-party gas and fluids might come from*"), the quantity of emissions ("*<u>how much</u> of them there might be*"), or the constituent elements ("*<u>what chemical composition</u> they*

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39 See Approval Reasons at [178]-[182] discussing Condition 4.
40 Approval Reasons at [178].
41 Approval Reasons [181], referring to "*additional conditions (Conditions 5, 6, 7 and 8) that establish further reductions in emissions*".
42 See Approval Reasons at [193].
43 See Approval Reasons at [197].
44 See Approval Reasons at [207].

might have") (AS [196]). The applicant's argument pays no attention to how these caps operate to negate any uncertainty about the inputs of feed gas.

41. There are other conditions that the Minister considered relevant to managing the future changes in composition of feed gas:

    41.1 Conditions 10 and 11 of the Minister's approval set up monitoring and reporting requirements. Condition 10 requires Woodside to implement predictive or continuous emissions monitoring at all emissions points sources, excluding flares, by 30 June 2030 with the subsequent requirement that continuous emissions monitoring be implemented at all point sources before commencing processing of third-party gas. The Minister reasoned that the monitoring requirement provided a mechanism for managing the future risks: "*continuous emissions monitoring is necessary and appropriate to accurately quantify the emissions of the proposed action and that continuous monitoring of the emissions identified by the department as likely to impact rock art is an essential component to understanding and managing future uncertainty around impacts*".[45] The Minister expressly referred to the fact that monitoring would be in place prior to third-party gas processing.[46] Condition 11 requires the proponent to describe and quantify air emissions from point sources arising from the action, amongst other things.

    41.2 Condition 15 also requires publication of that monitoring data, while Condition 16 requires Woodside to notify the department if it detects that any air emissions have exceeded the limits in Conditions 5, 6, 7 or 8.

    41.3 Condition 24 requires Woodside to "*notify the department electronically of the date of commencement of third-party gas processing within 5 business days following commencement of third-party gas processing*".

42. The applicant points to no error in the Minister's reasons that explain the basis on which each of these conditions were chosen. Having considered the detail of these conditions, and in particular the hard caps on air emissions, there was clearly an evident and intelligible justification for the Minister's conclusion that "*I consider that the*

45 Approval Reasons at [220].
46 Approval Reasons at [221]-[222].

application of stringent emissions reductions conditions means that the action will not have an unacceptable impact on the National Heritage values of the National Heritage place".[47]

43. This reasoning did not involve any deferral of the substantive task of assessing the impacts (ground 2) or unreasonableness in concluding that the conditions would mean the impact was not unacceptable (ground 3). There is also no factual basis for the separate argument put under ground 3 at AS [203]-[206] that the Minister required some additional precision about the sources of gas to be able to form a view about future economic benefits.

C-3 Ground 4: Assessment of impacts of climate change

44. The applicant argues that the Minister failed to take into account the impacts of climate change by reasoning that the proposed action was not a "*substantial cause*" (within the meaning of s 527E(1)(b) of the EPBC Act) of the physical effects of climate change: AS [207]-[224]. The findings are in the reasons for the reconsideration decision (**Reconsideration Reasons**) challenged in the separate proceeding VID1400/2025 and adopted in the Approval Reasons.

45. The Minister found that the proposed action is not a "*substantial cause*" (within the meaning of s 527E(1)(b) of the EPBC Act) of the physical effects of climate change on the national heritage values of the Dampier Archipelago.[48] The Minister made that finding on two independent bases:

    45.1 *First*, he found that the proposed action would not be likely to result in a "*net increase*" in greenhouse gas emissions and global average temperature and thus make a "*net*" contribution to the physical effects of climate change.[49]

    45.2 *Secondly*, the Minister found that, even if the proposed action would result in a net increase in global greenhouse gas emissions and global average temperature, any

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47 Approval Reasons at [309].
48 Approval Reasons at [39], [80].
49 Approval Reasons at [39(a)]; Reconsideration Reasons at [174].

net contribution would be "*very small*" as a proportion of global greenhouse gas emissions and as a matter of raw global temperature increase.[50]

46. Again, the disposition of this ground requires close attention to the Minister's reasons. The Minister's reasons do <u>not</u> proceed on the basis that s 527E(1)(b) imports a numerical or arithmetical test (cf AS [215]), essentially for the same reasons given at first instance in the *ECCQ* litigation,[51] in circumstances where the reasoning under consideration in that matter was in materially similar terms to the reasoning contained in the Reconsideration Reasons in this matter (the relevant requests having been submitted in relation to a number of projects at the same time). In this case:

    46.1 The Minister set out the relevant provisions of s 527E without qualification or refinement.[52]

    46.2 The Minister then reasoned that he was required to be satisfied that the proposed action was a substantial cause of the relevant effects of climate change.[53]

    46.3 The Minister then applied the relevant test having regard to information about the average total greenhouse gas emissions from the proposed and the proponent's estimate of the net increase in global greenhouse gas emissions and global average temperatures.[54]

    46.4 The Minister concluded that the possible increase in global greenhouse gas emissions and total average temperature resulting from the action was "*very small*".[55]

47. While the reasoning plainly had regard to the connection between the greenhouse gas emissions associated with the action and global temperature increases, that was a function of the nature of the impacts that were asserted by the ECCQ in its reconsideration request. The reasoning does not, in terms, adopt an arithmetical or

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50 Approval Reasons at [39(b)]; Reconsideration Reasons at [178]-[183].

51 First instance: *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)* (2023) 413 ALR 318 (***ECCQ PJ***). Appeal: *Environment Council of Central Queensland v Minister for Environment and Water* (2024) 304 FCR 91 (***ECCQ FC***).

52 Reconsideration Reasons at [158]-[159].

53 Reconsideration Reasons at [162].

54 Reconsideration Reasons at [163(a)] and [174]; see also [164]-[177].

55 Reconsideration Reasons at [163(b)], [182] and [187]; see also [178]-[183].

numerical test for "*substantial cause*" and nothing in the reasons indicates that the Minister did anything other than apply s 527E according to its terms.

48. It follows that the construction issue identified by the applicant, with support from the written submissions dated 2 June 2026 filed by the United Nations Special Rapporteur (**SRS**), does not arise.

49. If it is necessary for the Court further to consider the construction of s 527E(1), the first respondent makes the following submissions.

50. By way of preliminary comment, to the extent that the applicant contends that its ground picks up on an issue "*not argued*" in *ECCQ FC* (AS [214]), that contention must be treated with some caution. As the proponent explains at PS [151], the majority's observations in *ECCQ FC* at [46] are best understood as a comment about the way the case was put before it, rather than the identification of an important issue of construction left to be resolved in a later case. This aspect of the applicant's case reads the majority's reasons in *ECCQ FC* in isolation, without adequate regard to the way in which Ground 7 was put at first instance (see PS [140]) or floated again on appeal by Ground 5 (PS [143]), before essentially being left undeveloped in oral submissions. There, as here, the ground lacked merit because it proceeded upon an artificial and strained reading of reasons that were in materially similar terms to those at issue in this matter.

51. Even if the Minister did reason by reference to arithmetical or numerical factors, there is nothing in the terms of s 527E(1)(b) that precludes reasoning of the kind engaged in by the Minister. Indeed, in light of the factual and causal arguments advanced by ECCQ in its reconsideration request, such reasoning was entirely logical and appropriate.

52. *First*, the authorities concerning s 527E(1)(b) – including *ECCQ* – reveal that the consideration of the impacts of an action is essentially "*a factual inquiry*" and there is limited scope for judicial review of such evaluative factual conclusions.

53. In *ECCQ PJ*, McElwaine J observed that a similar argument to that put by the applicants had been put in *Australian Conservation Foundation* (discussed below).[56]

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[56] *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308 (***ACF PJ***) at [105]-[108] and [163] (Griffiths J).

His Honour referred to the New South Wales Court of Appeal's decision in *Badawi*,[57] where the Court of Appeal observed that the word "*substantial*" is "*a word of evaluative concept*", which had been said to "*be not only susceptible of ambiguity, but also to be a word calculated to conceal a lack of precision*".[58] Justice McElwaine proceeded to make the following observations:[59]

> *As I have demonstrated in addressing other grounds, 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. Here, as demonstrated by the coral bleaching example, the causal connexion is remote, in the sense that it is many times removed, in time and place, from the action of expanding the mine to extract a greater quantity of coal than is permitted under the extant approvals. Once that is understood, it is not useful in my view to place into the statutory scheme an interpretation of substantial taken from materially different statutory contexts and apply it as an overriding gloss.*
>
> *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.*

54. His Honour then rejected the argument that the Minister had reasoned in the manner asserted in the ground, finding that *"[t]he Minister did not in her reasons equate [the substantial] requirement with large or numerically significant*".[60] As noted above, the reasoning contained in the Mt Pleasant and Narrabri decisions at issue in the *ECCQ*

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57 *Badawi v Nexon Asia Pacific Pty Ltd* (2009) 75 NSWLR 503 (***Badawi***).
58 *Badawi* at [82] (Allsop P, Beazley, McColl, Basten JJA and Handley AJA).
59 *ECCQ PJ* at [153]-[154].
60 *ECCQ PJ* at [155]

proceedings was in materially similar terms to the reasoning contained in the Reconsideration Decision in this matter, as the applicant acknowledges at AS [209].

55. On appeal, Mortimer CJ and Colvin J, in rejecting ground 5, made further observations that are inconsistent with the applicant's argument. The joint judgment in *ECCQ FC* stated:[61]

> *The legislative scheme of the EPBC 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.*

56. A number of earlier cases have considered the appropriate approach to the evaluation of impacts associated with emissions from proposed actions:

    56.1 In *Wildlife Preservation Society of Queensland Proserpine / Whitsunday Branch Inc v Minister for the Environment & Heritage*,[62] the applicant sought judicial review of two referral decisions under s 75 in relation to new coal mines (prior to the introduction of s 527E).[63] The delegate noted that there was no suggestion that the mining of coal would increase the amount of coal burned in any particular year or cumulatively and reasoned that "*if there were any such increased emissions, the additional impact on protected matters would be very small and therefore not significant*".[64] In dismissing the application, Dowsett J observed that the delegate was required to "*address the impact of the proposed action, not the impact of the worldwide burning of coal*".[65] His Honour also observed that

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[61] *ECCQ FC* at [132]-[133].
[62] (2006) 232 ALR 510 (***WPS***).
[63] *WPS* (2006) 232 ALR 510 at [9]-[14], [27].
[64] *WPS* (2006) 232 ALR 510 at [43].
[65] *WPS* (2006) 232 ALR 510 at [55].

"[t]he relevant impact must be the difference between the position if the action occurs and the position if it does not".[66]

56.2 In *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*,[67] the applicant sought judicial review of a referral decision under s 75 with respect to an open cut coal mine. The delegate considered whether the proposed action was likely to have "*indirect impacts*" on protected matters "*as a result of any possible contribution to greenhouse gas emissions*".[68] The delegate found that, if all the coal produced by the proposed mine were to be consumed by end users, the combustion of that coal would produce per annum the equivalent of 0.04% of GHG emissions and that "*such emissions are a small proportion of the total possible emissions from all other sources".*[69] In dismissing the application for review, Stone J characterised the Minister's task under s 75 as "*a factual inquiry about the impact of an action*".[70] Her Honour noted that "*[a]lthough there is an element of indeterminacy injected by the requirement that the action has, will have or be likely to have a significant impact, it is quite different from an inquiry into legal causation.*" [71]

56.3 In *ACF PJ*, the applicant sought judicial review of an approval granted in relation to Adani's Carmichael project under ss 130(1) and 133 of the EPBC Act. In that case, the Minister had reasoned that "*[t]he actual quantity of emissions that is likely to be additional to current global GHG emissions depends on a range of variables*".[72] Those variables included: whether the coal (to be mined) replaced coal (that would otherwise be) provided by other suppliers, whether it was used as a substitute for other energy sources, the efficiency of the coal burning power plants and steps taken under internationally multilateral agreements.[73] It was, therefore, not possible to draw robust conclusions on the likely contribution of the project to a specific increase in global temperature.[74] In again dismissing the

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66 *WPS* (2006) 232 ALR 510 at [55].
67 (2007) 97 ALD 398 (***Anvil Hill***).
68 *Anvil Hill* (2007) 97 ALD 398 at [25].
69 *Anvil Hill* (2007) 97 ALD 398 at [26].
70 *Anvil Hill* (2007) 97 ALD 398 at [34].
71 *Anvil Hill* (2007) 97 ALD 398 at [34].
72 *ACF PJ* (2016) 251 FCR 308 at [58] (Griffiths J), referring to [138] of the reasons.
73 *ACF PJ* (2016) 251 FCR 308 at [58] (Griffiths J), referring to [138] of the reasons.
74 *ACF PJ* (2016) 251 FCR 308 at [58], referring to [140] of the reasons.

application for review, Griffiths J did not detect any reviewable error in the Minister taking into account the management and mitigation of direct and consequential GHG emissions.[75] His Honour observed that "*it was a matter for the Minister to make relevant findings of fact, including whether or not to accept that the new material established that the combustion emissions would, or were likely to, have the adverse impact on the Reef claimed by the ACF*".[76] His Honour approached the phrase "*substantial cause of [the] event or circumstance*" on the basis that it reflected the need for a "*causal nexus*".[77]

56.4 The Full Court dismissed an appeal from Griffiths J's judgment.[78] After referring to the Minister's reasoning with respect to the variables impacting upon any net increase in GHG emissions, the Court concluded that, although there may be grounds for "*disagreeing with the Minister's decision, but that is not our concern in an appeal limited to the lawfulness of that decision.*"[79]

57. The authorities therefore make clear that the Minister's assessment of whether something is the "*substantial cause*" of something else is a factual inquiry.

58. Rather than engaging with these authorities, or examining the text of the provision, the applicant's submissions take as their starting point the proposition that "*climate change is not the sort of problem that lends itself to simply quantitative analysis*": AS [218]. That is not an appropriate starting point in seeking to understand the meaning of a definitional provision of general application such as s 527E, which must be applied to a variety of different decisional contexts under the EPBC Act. The Court must construe s 527E according to its text and context, not the policy ambitions of the applicant and Special Rapporteur. Nor does it advance matters to complain that *"[i]f the test is whether an action's effects on the climate are greater than 'small' then the test will never be met*": AS [218], SRS [42]. The provision is not directed at assessing the impact of an action on "*the climate*". Rather, the events or circumstances with which the provision is concerned are impacts upon relevant matters of national environmental

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75 *ACF PJ* (2016) 251 FCR 308 at [165].

76 *ACF PJ* (2016) 251 FCR 308 at [174].

77 *ACF PJ* (2016) 251 FCR 308 at [162].

78 *Australian Conservation Foundation Inc v Minister for the Environment and Energy* (2017) 251 FCR 359 (***ACF FC***).

79 *ACF FC* at [61] (Dowsett, McKerracher and Robertson JJ).

significance. The "*stock problem*" identified by the applicant is addressed through other means, including s 10 of the *Climate Change Act 2022* (Cth).

59. Further, neither the applicant nor the Special Rapporteur explain the "*constructional choice*" (AS [221]) or "*ambiguity*" (SRS [40]) which arises, let alone the positive content of the particular test that the Minister is said to have failed to apply and why his reasons disclose error. The applicant simply characterises the test as a "*broader evaluative approach*" without identifying what that evaluative approach *is* (see, for example, AS [217], [221], [222]). The Special Rapporteur's argument is focussed on what is not permitted (being the alleged "*arithmetical*" approach): SRS [45], [46], [48].

60. In any event, the Special Rapporteur goes too far in suggesting at SRS [42][80] that Australia's international law obligations have the effect that an arithmetic or quantitative approach is necessarily insufficient to meet a State's due diligence obligation. In considering the required standard of conduct to meet the obligation to prevent environmental harm, the ICJ Advisory Opinion[81] did not prescribe *how* due diligence is to be achieved. In relation to environmental impact assessments, the ICJ did not provide guidance as to how a State can or should determine the threshold of due diligence is to be met, only that it must be informed by the specific character of the risk.[82] The absence of prescription in the ICJ Advisory Opinion as to particular quantitative or qualitative requirements that are necessary to discharge the duty of due diligence indicates there is an ambit of discretion afforded to States.

61. As to the other aspects of the applicant and the Special Rapporteur's submissions, which draw support from Australia's international obligations, the first respondent otherwise adopts the second respondent's submissions at PS [187]-[191].

62. For the reasons above, the Minister's reasoning was consistent with the text of s 527E and the authorities which have considered it, and no further constructional choice has been identified which requires resolution.

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80 Especially the second sentence.

81 *Obligations of States in Respect of Climate Change (Advisory Opinion)* [2025] ICJ Rep 187 (**ICJ Advisory Opinion**).

82 ICJ Advisory Opinion at [295]-[300].

C-4 Ground 5: Apprehended bias

63. For the reasons given by the proponent at PS [223]-[274], the applicant does not attempt to engage with the *Ebner* test, and the ground fails on its facts. Given the ground fails on orthodox principles, there is no need to decide whether the applicant was owed procedural fairness in relation to the decision to approve the NWS Extension Project under s 133 of the EPBC Act: cf PS [215]-[222].

PART D — CONCLUSION

64. The application should be dismissed with costs.

Date: 23 June 2026

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