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IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

VID1357/2025

FRIENDS OF AUSTRALIAN ROCK ART INC

Applicant

MINISTER FOR ENVIRONMENT AND WATER

First Respondent

WOODSIDE ENERGY LTD (ACN 005 482 986)

Second Respondent

APPLICANT'S OUTLINE OF SUBMISSIONS IN REPLY

1 This is a reply to the outlines of submissions filed by Woodside on 9 June 2026 (**WS**) and the Minister on 23 June 2026 (**MS**).[1]

A. THE RESPONDENTS' THREE OVERARCHING ERRORS

2 Before responding to Woodside and the Minister in respect of each ground of review, it is necessary to address three broad issues in the Respondents' submissions:

2.1 *First*, the factual context that bears upon how the Minister made the impugned decision.

2.2 *Second*, the statutory task of the Minister under the *EPBC Act*.

2.3 *Third*, the correct approach to construing the Minister's statement of reasons.

3 ***Factual context***. The Applicant summarised the procedural history and factual context to the Minister's decision at **AS [30]-[40]**. These facts are critical to determining whether a jurisdictional error has been committed: "the nature of the error has to be worked out in each case concerning a specific decision under a particular statute".[2] Woodside fails

1 These submissions adopt the defined terms in the outline of submissions of the Applicant filed on 13 April 2026 (**AS**).

2 ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; (2024) 280 CLR 321 at [5] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), quoting *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [101]; *Nathanson v Minister for Home Affairs* [2022] FCA 26; (2022) 276 CLR 80 at [78]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17; (2023) 276 CLR 136 at [77].

to engage with the relevance of those facts to the decision-making that is the subject of this challenge. Its defence of the Minister's decision-making accordingly proceeds at a level of abstraction which fails to answer the fact-sensitive[3] grounds of review alleging irrational, illogical or unreasonable decision-making, or alleging a misunderstanding of the law in reaching requisite states of satisfaction.

4 In particular, **Grounds 3, 4 and 7** raise the temporally specific question of whether, on or around 12 September 2025, the Minister acted on a rational basis in:

4.1 identifying the impacts of the proposed action and assessing whether those impacts were acceptable before he decided to approve the NWSx Project with the attached conditions; and

4.2 considering whether approving the proposed action with those attached conditions would not be inconsistent with the National Heritage Management Principles.

5 In short, the Applicant submits the Minister failed to do both. (**AS [6]**). In effect, the inference is open on the evidence that the Minister (and the Department) proceeded on the basis that the NWSx Project had already been approved on 28 May 2025, and that he could attach certain conditions to the proposed approval because they were feasible for Woodside to comply with to ensure their attachment would not prevent the proposed action from occurring[4] rather than because they were necessary or convenient for protecting a Pt 3 provision-protected matter.

6 In the course of addressing **Grounds 3 and 4**, Woodside appears to implicitly submit the Minister's decision-making process was to consider the s 136 considerations and (in substance) approve the NWSx Project in May 2025 *before* the consultation with Woodside occurred, and then to attach conditions to that approval after that consultation. That approach is contrary to the statutory scheme and would impermissibly bifurcate the decision-making process (**AS [86]-[90]**).

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3 See *Minister for Immigration and Multicultural Affairs v* ***SSVJ*** [2026] FCAFC 45; (2026) 315 FCR 435 at [36].

4 In addition to the factual background set out in AS [36]-[39], the Applicant also intends to seek leave to tender at the hearing documents recording what was said at the meeting between the Minister, the Department and Woodside on 25 August 2025. Documents produced by the First Respondent identified as notes of the 25 August 2025 meeting are annexed to the Affidavit of Anita O'Hart affirmed 7 July 2026 at ACO-2.

7 ***Statutory task***. Both Woodside and the Minister fail to engage with the purpose and context of the legislation that governs the approvals process set out in Pt 9. By overlooking those key ingredients of the process of statutory construction, the Respondents misconstrue each of the relevant provisions: ss 130, 133(1), 134, 136(1)(b) and 137A.

8 The power to approve a proposed action, with any attached conditions is governed by Pt 9 of the *EPBC Act*. A Pt 9 approval follows the detailed processes for environmental assessment set out in Pt 8. Neither Woodside nor the Minister engage with how the legislation, by design, is structured to provide a mechanism for an exemption to permit a person to take an action that would otherwise be prohibited and an offence. This exemption is provided for in the context of a statute that is concerned with the protection of the environment,[5] being relevantly the matters protected under Pt 3.

9 Neither Woodside nor the Minister even refer to the objects clause of the *EPBC Act*, or otherwise meaningfully grapple with what the *EPBC Act* is designed to achieve on its terms and its evident purpose (cf **AS [14]-[27], [64]-[65], [72], [86]-[97], [140]-[142]**).

10 Woodside asserts that 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'" (**WS [78]**). That asserted purpose misconceives the terms and the purpose of the *EPBC Act*. This legislation is not designed to achieve project approvals; it is designed to enable the protection of the environment with strictly regulated exceptions for when projects can be approved despite their environmental impact (**AS [11]-[13]**). To the extent that Woodside seeks to rely upon an observation of Allsop CJ in *Minister for the Environment v Sharma*, that was in the context of a negligence claim regarding the Minister's duty of care and so used the language of "responsibility", for the purposes of ss 130 and 133, in that sense.[6] That does not offer any guidance here. In any event, even if the Minister's "fundamental" responsibility specifically under ss 130, 131, 133 and 134 is to determine whether or not to approve a proposed action, it is a responsibility

5 *EPBC Act* s 3(1). See also **AS [11]-[13]**.
6 *Minister for the Environment v Sharma* [2022] FCAFC 35; (2022) 291 FCR 311 at [88] (Allsop CJ).

shaped by the statutory context and purpose of an Act which is about environmental protection first and foremost, not a project approval and development statute.

11 The proper construction of the relevant provisions in their statutory context and in light of their purpose demonstrates the ways in which Parliament has expressly and impliedly limited the Minister's task to approve a proposed action with conditions in multiple ways.[7] Relevantly, the express limits on the Minister's statutory task include complying with ss 136 and 137A. The powers to approve and to condition that approval are also (at least) subject to the requirement of legal reasonableness.[8] Because of Woodside's approach to the facts and statutory construction, its attempts to cast the Applicant's submissions as impermissible merits review or a judicial intrusion into matters purely within the Minister's discretion misconceive the Applicant's arguments, are not grounded in the statutory text, considered in its context, or the facts of this case (**WS [42]-[44], [126], [143]**).

12 Further, as the Applicant has submitted, following Jackson and Kennett JJ in *Gelorup Corridor*, the powers in ss 130, 133(1) and 134(1) are *interrelated* and impose a duty to make a decision of a particular kind (**AS [86]-[93]**). That is, the approval power in ss 130 and 133(1) and the conditions power in s 134(1) are not sequential but are interrelated as part of one overall statutory task for the Minister (**AS [86]-[90]**).

13 It is not clear to what extent Woodside takes issue with this construction or aspects of the Full Federal Court's reasoning in *Gelorup Corridor* upon which the Applicant relies; it appears from **WS [133]-[134]** that Woodside takes issue at least with **AS [92]**. Woodside's apparent approach is to construe each provision in isolation: s 133 (**WS [110]**), s 134 (**WS [129]-[130], [132]**) and s 136 (**WS [88]-[89]**), without then addressing the ways in which these provisions relevantly condition or define the Minister's ultimate statutory task in the context of this approval decision. This piecemeal approach to construction is unorthodox and apt to lead to error.

14 ***Construing the Minister's statement of reasons***. As addressed further below by reference to specific grounds of review, in several instances the Respondents take issue

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7 *LPDT* [2024] HCA 12; (2024) 280 CLR 321 at [3] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

8 *Friends of the* ***Gelorup Corridor*** *Inc v Minister for the Environment and Water* [2023] FCAFC 139; (2023) 299 FCR 236 at [65].

with the Applicant's contentions by essentially rewriting the Minister's reasons, or otherwise asserting that the Applicant is seeking merits review (**WS [7], [55], [76], [143]**; **MS [24], [43]**). Neither of those strands of argument withstand scrutiny having regard to the applicable principles for construing administrative statements of reasons noted below.

15 *First*, an administrative decision-maker's reasons should be read fairly as a whole, and are not to be "construed minutely and finely with an eye keenly attuned to the perception of error".[9] Underlying that bedrock proposition is a concern that a reviewing court may otherwise turn a review of the reasons into a reconsideration of the merits.[10] But *Wu Shan Liang* does not mean that the reasons should be strained in order to reach an interpretation that would uphold the legal validity of the decision-maker's decision.[11] Nor does it demand that any ambiguity in the reasons be resolved in favour of the decision-maker.[12] Close attention must be given not just to the content but also to the structure of the reasons.[13]

16 *Second*, and relatedly, what is demanded – as a matter of law – of the statement of reasons is informed by the statutory obligation pursuant to which the reasons are prepared.[14] Where, as here, the statutory obligation underlying the statement of reasons requires the decision-maker to set out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, the "intelligible justification" or rational basis for the decision must at least ordinarily lie within the four corners of the decision-maker's reasons.[15] That principle has been applied by this Court in determining whether there has been an unreasonable

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[9] *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272, referring to *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 287 (Brennan CJ, Toohey, McHugh and Gummow JJ). See also at 291 (Kirby J).

[10] ***DVRL*** *v Minister for Immigration and Citizenship* [2026] FCAFC 73 at [141] (Lenehan J; Perry and Stellios JJ agreeing)).

[11] *DVRL* [2026] FCAFC 73 at [141] (Lenehan J; Perry and Stellios JJ agreeing); *Della Bruna v Health Care Complaints Commission* [2025] NSWCA 105 at [9]-[16] (Bell CJ and Kirk JA).

[12] *Minister for Home Affairs v Ogawa* [2019] FCAFC 98; (2019) 269 FCR 536 at [115]-[117] (Davies, Rangiah and Steward JJ).

[13] *Racing NSW v Australian Turf Club Ltd* [2026] NSWCA 115 at [61] (Kirk and Stern JJA and Griffiths AJA).

[14] *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [5], [10] (Gleeson CJ), [37] (Gaudron J), [69] (McHugh, Gummow and Hayne JJ). See also *Minister for Immigration and Multicultural Affairs v SSVJ* [2026] FCAFC 45; (2026) 315 FCR 435 at [23], [37] (Perry, Kennett and Shariff JJ).

[15] *Minister for Immigration and Border Protection v* ***Singh*** [2014] FCAFC 1; (2014) 231 FCR 437 at [44]-[47] (Allsop CJ, Robertson and Mortimer JJ).

exercise of a discretion,[16] and whether a state of satisfaction has been formed irrationally.[17] The reasons either demonstrate a justification or a rational basis or they do not.[18] To that end, the failure to include a matter in a statement of reasons may justify a court in inferring that the matter was not taken into account, in answering that question of fact.[19]

17 *Third*, the "cutting and pasting" of earlier decisions in statements of reasons or the uncritical adoption of one set of submissions presents a risk of failing to undertake the statutory task.[20] That is especially where such copying and pasting occurs with respect to facts in issue or contentious matters,[21] or where it does not simply involve the receipt of assistance from departmental officers.[22]

B. GROUND 1

18 Woodside's asserted construction of s 136(1)(b) as a provision essentially unmoored from legislative constraint is contrary to principle and to authority (cf **WS [44], [77]-[80]**). Unfettered and unreviewable power is not known to Australian law.[23]

19 ***Principle.*** Properly construed, s 136(1) operates to permit the Minister to balance the important protective purposes of the Act (s 136(1)(a)) with "economic and social matters" (s 136(1)(b)). But recognising that the text of s 136(1)(b) confers a broad discretion is not the end of the inquiry. While no doubt broad, the discretion is not unbounded nor outside the proper purview of judicial review (cf **WS [40.1], [44], [77]**). The nature of the decision-making being "evaluative" or even as the Minister labels it,

16 *Singh* [2014] FCAFC 1; (2014) 231 FCR 437 at [47] (Allsop CJ, Robertson and Mortimer JJ).

17 *SSVJ* [2026] FCAFC 45; (2026) 315 FCR 435 at [37] (Perry, Kennett and Shariff JJ).

18 *Singh* [2014] FCAFC 1; (2014) 231 FCR 437 at [47] (Allsop CJ, Robertson and Mortimer JJ).

19 See *Sullivan v Department of Transport* (1978) 20 ALR 323 at 349 at 352-353, cited in *ARM Constructions Pty Ltd v Commissioner of Taxation* [1986] FCA 108; (1986) 10 FCR 197 at 205.

20 See *MZZZW v Minister for Immigration and Border Protection* [2015] FCAFC 133; (2015) 234 FCR 154 at [61]-[66] (Tracey, Murphy and Mortimer JJ); *SZRBA v Minister for Immigration and Border Protection* [2014] FCAFC 81; (2014) 314 ALR 146 at [20] (Siopis, Perram and Davies JJ). See generally ***LVR (WA) Pty Ltd*** *v Administrative Appeals Tribunal* [2012] FCAFC 90; (2012) 203 FCR 166 at [90]-[92], [95] (North, Logan and Robertson JJ).

21 See *LVR (WA) Pty Ltd* [2012] FCAFC 90; (2012) 203 FCR 166 at [48], [55] (North, Logan and Robertson JJ).

22 See *Roberts v Attorney-General (Cth)* [2022] FCA 574; (2022) 176 ALD 509 at [43] (Lee J). See generally *LVR (WA) Pty Ltd* [2012] FCAFC 90; (2012) 203 FCR 166 at [88] (North, Logan and Robertson JJ).

23 *Abdel-Hady v Commonwealth* [2026] HCA 17 at [1] (Gageler CJ, Gleeson and Beech-Jones JJ), citing *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; (2017) 263 CLR 1 at [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 at [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

"polycentric", does not displace the constraints that exist on s 136(1)(b) as a matter of proper statutory construction (cf **MS [9]**).

20 The constraints on s 136(1) are both express and implied (see **AS [72]**). The power is confined by the statutory purpose and context of the *EPBC Act*, as even the broadest evaluative criteria of discretionary power such as the "national interest" are.[24] The constraints on s 136(1)(b) are underscored by the operation of s 136(2)(a) which requires that the Minister "[i]n considering *those* matters", being relevantly economic and social matters, take into account the principles of ecologically sustainable development. As explained at **AS [72.1]**, where economic detriments already form part of the usual calculus for project approval, in the context of the *EPBC Act* which was designed to supplement that calculus by way of environmental considerations, it is not only supported but required by the *EPBC Act* for the Minister to consider economic detriments of a proposed action, where relevant (cf **WS [46]**).

21 In effect, Woodside seeks to transform the mandatory consideration of "economic and social matters" to something akin to the court's very limited role in ascertaining parliamentary privilege where once a matter is held to be so privileged, it is in the exclusive cognisance of the parliament.[25] That is, on Woodside's construction of s 136(1)(b), as soon as the Minister has recited something that facially appears to be an economic or social matter, that is the end of the court's inquiry because that is the end of Parliament's check on that conferral of power (**WS [44]**, **[77]**). There being no foothold for that construction in the *EPBC Act* itself, the lynchpin of Woodside's argument instead appears to be Jessup J's statement in *Tarkine* that s 136(1) is not "a means to make the Minister's choice of subject matter justiciable in a court". But that statement, and the language of justiciability, must be understood in context. Not only was Jessup J there considering the meaning and operation of s 136(1)(a) and *not* s 136(1)(b), his Honour was responding to the argument put by the appellant that the Minister had erred by not considering cumulative impacts as part of his consideration under s 136(1)(a). That is a *specific* matter that the appellant urged to be held as a mandatory consideration, not a

24 *Madafferi v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 220; (2002) 118 FCR 326 at [89] (French, O'Loughlin and Whitlam JJ), citing *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391. See also *SSVJ* [2026] FCAFC 45; (2026) 315 FCR 435 at [20] (Perry, Kennett and Shariff JJ) and the cases cited therein.

25 *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162 (Dixon CJ).

natural sub-category of the neutral term "matters". Consequently, Woodside offers no statutory or judicial authority for its construction of s 136(1)(b).

22 Woodside also erects a strawman at **WS [48]** and **[56]** to characterise the Applicant's submission as obliging the Minister "to consider all public comments" or "specifically discuss each representation identified in each submission". That is not the Applicant's submission. Rather, as put at **AS [72]**, the submission is that on the materials before the Minister it was clearly articulated that there were submissions as to economic detriments. It is that sub-category of material which fell to be considered by the Minister, not each individual submission as to economic detriment that is set out in **AS Annexure A**.

23 As for the Minister, he says that he considered all of the decision brief material.[26] In those circumstances, it is not to the point that the submissions as to economic detriment before the Minister had not been formally invited under s 131A and so had no legal status thereunder (cf **MS [10]**). That sub-category of material was before the Minister. It was significant. The Minister purported to consider it as part of the decision brief. And yet there is an absence of reference to such material in the reasons, at any level of generality. That absence cannot be explained away by the Minister attaching no weight to that material. Economic detriments are inherent in the cost-benefit calculus of a project approval. That the decision-making as to project approval occurs here within the protective statutory scheme established under the *EPBC Act* only bolsters the necessity of the consideration of that sub-category of economic matters.[27] The Minister attempts to answer this by asserting that he was under no obligation to consider "every comment or submission" (**MS** [**7(a)]**), but this is no answer to the Applicant's complaint which is different in nature and more fundamental. A proper conduct of the evaluative exercise by the Minister required consideration of both facets of economic matters, beneficial and detrimental, raised clearly on the material before him (see **AS [72]**).[28]

24 ***Authority***. In *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* (***Buzzacott***), Besanko J held that the Minister does not have "an unfettered discretion under s 136(1) to decide what was relevant and therefore what he

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26 Affidavit of Anita O'Hart affirmed 7 July 2026 at ACO-4.

27 See generally *Chief Commissioner of Police v Crupi* [2024] HCA 34; (2024) 98 ALJR 1131 at [19] (Gageler CJ, Edelman and Beech-Jones JJ).

28 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 275 CLR 582 at [25] (Kiefel CJ, Keane, Gordon and Steward JJ).

consider[s]. In my respectful opinion, such an approach would be erroneous".[29] That holding was not challenged on appeal.[30] *Buzzacott* thus stands in the way of Woodside's purported construction of s 136(1)(b) as apparently embraced by the Minister.

25 None of the other cases relied on by Woodside at **WS fn 32** and the Minister at **MS [11]** are authority on the proper construction of s 136(1)(b), or assist them to circumvent *Buzzacott* and establish the unfettered construction of s 136(1)(b) for which they contend.

25.1 ***Blue Wedges Inc v Minister for Environment, Heritage and the Arts***.[31] The relevant focus was on s 136(1)(a), which relates to mandatory consideration of "matters relevant to any matter protected" by a Pt 3 provision that is a controlling provision. The applicant sought to argue that the Minister was "bound to take into account the impact of maintenance dredging, the impact of oil or chemical spills, and the impact of the removal and disposal of toxic sediment".[32] Those were specific matters. There was no argument that environmental detriments were necessary, at that level of generality, to consider. That no such argument was run is explicable by the very nature of s 136(1)(a), concerning environmental matters, in an environmental protection statute, being concerned only with *impacts* on the environment. It is accordingly in that context that North J stated at [115] that s 136(1)(a) "left it to the Minister to decide what were the matters relevant to the protected matters which he should take into account". Indeed, in *Buzzacott*, Besanko J expressly considered North J's discussion as part of his Honour's conclusion that s 136(1) does not confer an unfettered discretion. The highest that the point goes is that an argument is not available that the Minister is bound to consider a *specific* matter "in a particular manner and to a particular extent".[33] That does not answer Grounds 1 and 2 of the Applicant's amended application.

25.2 ***Tarkine National Coalition Inc v Minister for the Environment***.[34] In considering the operation of s 136, Jessup J observed at [25] that sub-s (1) "mark[s] out the

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29 [2012] FCA 403; (2012) 291 ALR 314 at [78].

30 *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111; (2013) 215 FCR 301.

31 ***Blue Wedges*** *Inc v Minister for Environment, Heritage and the Arts* [2008] FCA 399; (2008) 167 FCR 463.

32 [2008] FCA 399; (2008) 167 FCR 463 at [113] (North J).

33 *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403; (2012) 291 ALR 314 at [84].

34 ***Tarkine*** *National Coalition Inc v Minister for the Environment* [2015] FCAFC 89; (2015) 233 FCR 254.

broad categories of consideration to which the Minister was required to turn his mind" and that it does not deal "at the level of detail, with particular matters that require[] consideration". So much can be accepted. But consideration of a sub-category that is one half of what comprises a "matter" – a detriment and a benefit – is required, having regard to the proper construction of s 136(1)(b) and the material before the Minister. Further, at [45], Jessup J then went on to say that "s 136(1)(a) could not be used as a means to make the Minister's choice of subject matter justiciable in a court". Again, and as noted above, given that this case considered the nature of s 136(1)(a) and not s 136(1)(b), and where the environmental matters which must be considered under s 136(1)(a) necessarily would be detriments, the statement does not lend any credible support to Woodside's attempt to transform s 136(1)(b) into an effectively unbounded and unreviewable power.

25.3 ***Friends of Nyah Vinifera Park Inc v Minister for Environment and Water***.[35] This case does not add anything to Woodside's asserted construction beyond citing each of *Blue Wedges* and *Tarkine*.

26 ***No consideration as a matter of fact***. The Minister's alternative contention that he did take into account economic detriments finds no footing in his reasons (cf **MS [12]**). It is insufficient for such a topic to have been properly considered by way of a highly generalised statement as to "[c]oncerns with extending the facility's operation to 2070" (**AS [80]**), nor by way of a generalised circular statement asserting consideration of "any *relevant* submissions received from the public in making my decision" (emphasis added) (**MS fn 9**).[36] That is especially so where with respect to *social* impacts, the Minister does independently parse between the sub-categories of materials in relation to both social benefits and detriments (**AS [69]**). It is also not determinative that the Minister considered the economic detriments that he was legally required to consider because he circled Recommendation 1 in the Decision Brief (cf **MS [12]**).[37]

35 [2026] FCA 584 at [97]-[98] (Horan J).

36 *Khawaja v Attorney-General (Cth)* [2022] FCA 334; (2022) 293 FCR 396 at [100]-[101] (Thawley J).

37 See *Kelly v Minister for the Environment and Water* [2025] FCA 264; (2025) 309 FCR 256 at [94] (Perry J).

27 For the same reasons, the absence of *any* consideration of economic detriments cannot be explained away by Woodside asserting that the Minister attached no weight to that material (**WS [5**]) especially given the Minister's reasons say no such thing.

C. GROUND 2

28 At the heart of Woodside's response to ground 2 lies an attempt to paper over the deficiencies in the Minister's reasons through reliance on its own submission document to the Department (**WS [74]-[76], [91]-[92]**). So too the Minister, who seeks to insert *ex post facto* reasoning into his statement of reasons by reference to annexed material at **MS [17]**.

29 The Respondents' approach is directly contrary to the principles set out at paragraphs 15-17 above and should be rejected. In particular, it is not permissible to fill gaps in the Minister's reasons by speculating about what further unarticulated considerations or justifications might lie behind what he said.

30 There is no evidence in the Minister's statement of reasons, which must comply with the requirements in s 13 of the *ADJR Act*, of the Minister having grappled with the contingency of any benefit of the NWSx Project. The point is not that the Minister can only take account of economic and social matters "which exist with certainty" (cf **WS [86], [88]**). Rather, the proper, reasonable discharge of the statutory task requires an understanding by the Minister of differing levels of probability that attach to the environmental, social and economic matters which he is bound to consider under s 136(1) (**AS [79]-[80]**).

31 Consideration of the Browse Development's economic benefits was irrelevant to the Minister's decision-making and prohibited by the *EPBC Act*. The requirement that the economic and social matters considered to be of *the* project is not a "gloss" on the statutory text (cf **MS [22]**); rather, it is to pay proper regard to the statutory text, read in light of the context of the *EPBC Act* and the object of environmental protection. The Minister merely asserts at **MS [22]** that the Browse Development bears a sufficient connection for the purposes of s 136(1)(b) to the NWSx Project. That assertion is unsupported by the proper construction of s 136(1)(b) set out in **AS [77]**, and in any event undermined by the Minister's acknowledgement that the Browse Development was one of various possible third-party sources for the proposed action continuing past 2030 (see

MS [18]) and which is in fact less progressed than other sources such as the Pluto Gas Project (**AS [78]**). As to Woodside's argument at **WS [83]** that the unfettered nature of the power in s 136(1)(b) is such that the Browse Development's economic benefits could be considered as part of deciding whether and how to approve the NWSx Project, that argument must fail for the same reason as its construction argument above (addressed at paragraphs 19-21).

32 In any event, the Respondents' attempts to establish that the Minister considered the layers of contingency attending any economic benefits of the interaction between the as-yet-unapproved Browse Development and the NWSx Project is strained:

32.1 **WS [72]** is mistaken as the reference at **SOR [250]** to the "proposed action" is plainly a reference to the NWSx Project, and not the Browse Development;

32.2 **WS [76]** and **[92]** are the only attempts that Woodside makes to identify in the Minister's reasons something that could conceivably indicate he considered the contingency of the economic benefits of the Browse Development for the purposes of approving the NWSx Project alone. Yet even then, all that the sentences quoted from the reasons at **SOR [251]-[252]** show is a recognition that the Browse Development itself had not been approved, rather than the relevant consideration – that the claimed economic benefits of *this* NWSx Project therefore cannot include those benefits from the Browse Development without heeding its contingency. That failure is identified at **AS [80]** and remains unanswered by Woodside.

32.3 **WS [99]** attempts to obviate the error with the Minister evidently not grappling with the likelihoods attaching to various putative economic benefits in considering those matters, by falling back on Woodside's (and the Minister's) overbroad construction of s 136(1)(b) as conferring an unfettered construction. Once s 136(1)(b) is properly construed and read as subject to the constraints imposed by the context and purpose of the *EPBC Act*, and the implied requirement of reasonableness, it is apparent that the Minister needed to evince an evident and intelligible justification for considering the Browse Development's potential joint economic benefits with *this* proposed action (even if that were permissible). In that way, s 136(1)(b) "prescribes" reasonable and logical decision-making. That lawful consideration thus demanded recognition that those joint benefits were built upon layers of contingency. In circumstances where the Minister failed to recognise this, he did not properly undertake his statutory task.

32.4 **MS [16]-[17]** tries to broaden out the view of the Minister's reasons by reference to **SOR [249]** where the Minister only stated that Woodside had provided economic information under two scenarios, one of which was with the "economic impacts from developing the Browse fields". On this basis, the Minister seeks to argue that he "clearly distinguishes between the two relevant scenarios". But that is not the vice that the Applicant alleges. It is not that the Minister did not grasp that the Browse Development was *separate*, but that he considered its economic benefits (i) at all, when his decision-making concerned approval of a different project; and in any event, (ii) without recognition that the distinct nature of the Browse Development means that its joint economic benefits also have to be taken into account with a recognition of their contingency.

33 Indeed, the combined effect of Woodside's arguments in respect of Grounds 1 and 2 are to reduce both what is demanded of the Minister in his exercise of power under s 136(1)(b) and in his reasoning contained in a statement of reasons he must prepare under s 13 of the *ADJR Act*, almost to nothingness. On Woodside's account, the Minister can consider nothing or everything as part of economic and social matters, and can refer to anything or nothing in his statement of reasons, and all of that would be lawful. His statutory power is unbounded. That cannot have been envisaged by Parliament in setting up the prescriptive and protective regime that is the *EPBC Act*.

D. GROUNDS 3 TO 5

34 As addressed at **AS [85]-[86]**, Grounds 3, 4 and 5 each impugn the Minister's state of satisfaction when he considered and decided to approve the NWSx Project with the attached Final Conditions. The errors are distinct, but each ground is premised upon the construction of ss 130, 133 and 134 of the *EPBC Act* that the Applicant sets out at **AS [86]-[97].** This construction is consistent with Full Court authority.[38]

35 As noted above, Woodside does not engage with this construction and instead seeks to bundle them together and mischaracterise each ground (**WS [108]-[109]**). Consequently,

[38] *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* [2023] FCAFC 139; (2023) 299 FCR 236 at [64]-[65] (Jackson and Kennett JJ).

many of the submissions on these grounds are not responsive to the actual jurisdictional errors alleged.

36 For the following additional reasons, Woodside and the Minister's submissions on each Ground should be rejected.

D.1 Ground 3

37 The central contention in Ground 3 is that the Minister did not form the requisite state of satisfaction before deciding to approve the NWSx Project with the Final Conditions (**AS [99]**). The factual premise for that contention is that the material and advice provided by the Department upon which the Minister relied at the time he made the decision did not either prompt him to form the necessary state of satisfaction and/or provide him with a rational basis upon which to do so.

38 Woodside gives two reasons the Court should dismiss Ground 3 that are (at best) tangentially relevant to the ground:

38.1 *First*, Woodside contends the Applicant has impermissibly attached weight to the Legal Considerations Report because that document is not part of the assessment documentation under the *EPBC Act* (**WS [111]-[112].** See also **MS [33]**); and

38.2 *Second*, the Legal Considerations Report did not lead the Minister into any error because:

(a) At the time he formed the view he proposed to approve the action (presumably in relation to the Proposed Decision in May 2025) he had before him the Legal Considerations Report that identified and considered each of the matters to which the Minister was required by s 136 to have regard (**WS [114]**).

(b) The Legal Considerations Report contemplated the possibility that the proposed conditions might change with the provision of further information **WS [117]**.

(c) At the time the Minister made the decision under review the Legal Considerations Report is said to be "very far from the only material that the

Minister had before him" (**WS [118]**). Relevantly, he had the Department's final recommendation that recommended the "new" emissions reductions conditions meant that the action "will not have an unacceptable impact on the [NHV] of the [NHP]" (**WS [119]**). This material supported a conclusion that the Minister was satisfied that the conditions "were necessary or convenient" for protecting, or repairing or mitigating damage to, the National Heritage Place for the purposes of s 134 (**WS [119]**).

(d) None of the analysis in the Legal Considerations Report had changed by the time the Minister made the approval decision. The Department's final recommendation explained the basis for the imposition of each of the final conditions (**WS [127])**.

(e) Accordingly, there was "more than sufficient material before the Minister to allow him to form the state of satisfaction required under s 134" (**WS [127]**).

39 Woodside's first argument is disconnected from the facts and inconsistent with its second argument.

40 It is evident the Minister – acting on the advice of his Department – placed weight upon the Legal Considerations Report when he came to approve the NWSx Project with the attached conditions on 12 September 2025. The first recommendation in the final decision package cover page reads: "Consider the information in this submission and attachments … which includes the Western Australia Assessment Report *and the department's Legal Considerations Report*" (emphasis added).[39] The Minister circled that he had "Considered" this material. The Department's recommendation submission also notes at [116] that "For reasons set out in this brief, the proposed decision submission (<u>Attachment F1</u>), *and the legal considerations report* (<u>Attachment F9</u>), the department recommends you approve the proposed action for the purposes of the controlling provision of National Heritage place (sections 15B & 15C) subject to the conditions of approval [the Final Conditions]" (italic emphasis added).[40] At [118] of the recommendation submission, the Department "asserts that any likely short-term impact

[39] Recommendation submission at p. 1.
[40] Recommendation submission at p. 22.

on the NHP would be small and therefore outweighed by the social or economic factors discussed in this brief". That paragraph must sensibly be read as the Department referring the Minister again to the mandatory considerations of the s 136(1)(b) matters addressed in the Legal Consideration Report (noting that there is no further discussion or analysis of the "social or economic factors" in the recommendation submission).

41 The Legal Considerations Report had been prepared by the Department in advance of the Proposed Decision and it was the only document before the Minister that identified and analysed the matters which the Minister must and may consider under the *EPBC Act* in deciding whether to approve the proposed action, critically, in the form the proposed decision took in May 2025 on the information considered and assessed by the Department at that point in time (**AS [103]-[104]**). The Applicant does not seek to attach special significance to the name or form of that departmental advice: the key contention is that there was no equivalent material before the Minister in relation to the final decision. Both Woodside's and the Minister's submissions fail to engage with this contention.

42 Further, Woodside's first argument is inconsistent with its acceptance at **WS [114]** that the Legal Considerations Report was, in fact, the material before the Minister that performed the s 136 assessment at the time "he formed the view that he proposed to approve the action". On any view of the legislative scheme, that assessment was a mandatory consideration before the Minister could exercise his power to approve the NWSx Project. Part of the Applicant's contention in relation to Ground 3 is that the Minister had to, and failed to, undertake this assessment when he came to purportedly exercise his statutory powers under ss 130, 133 and 134 on or around 12 September 2025.

43 Woodside's second argument (summarised at paragraph 38.2 above) appears to proceed on the implicit basis that the Minister exercised the power to approve the proposed action under ss 130 and 133(1) on 28 May 2025 and then exercised the power to condition that approval under s 134 on 12 September 2025. The logic of the argument is that the Minister (relying on the Legal Consideration Report) considered the s 136 considerations when he formed the view he would approve the NWSx Project (before the consultation with Woodside) and then, when the Department received more information from Woodside on the air emissions conditions, the Minister was satisfied those new conditions could be attached to the approval pursuant to s 134.

44 Assuming that to be the premise, as a matter of construction that would be at odds with the scheme and, in particular, the operation of ss 130, 133(1), 134 and 136 that constrain the Minister's discretion to approve an action with conditions (for the reasons given by Jackson and Kennett JJ in *Gelorup Corridor* (see **AS [87]-[93]**])).

45 The Minister appears to take a similar approach at **MS [31]** by submitting that the statutory test under s 134(1) is "whether the conditions are 'necessary or convenient'" and the Act contemplates consultation on the conditions on an approval. The Applicant relies upon the construction of s 134(1) (and s 134(2)) set out as **AS [95]-[97]**) and contends the Minister's general submission that the "final conditions set" were "necessary or convenient" pays insufficient regard to the statutory task the Minister was required to engage in. In any event, the Minister's assertion that the Applicant has impliedly assumed there can only be "one set of conditions" that is "necessary or convenient" wholly fails to engage with the jurisdictional error that is alleged (in either Ground 3 or 4).

46 Moreover, assuming that the *EPBC Act* permits the Minister in some instances to vary conditions after proposing to approve the taking of an action following consultation with a proponent and other Ministers, the statutory scheme does not permit a Minister to bifurcate the decision-making process when the attachment of a condition (here, the air emissions reduction conditions) makes the difference between the impacts of the proposed action on the MNES being unacceptable or acceptable without first having a rational basis of what the imposition of the condition(s) will achieve (**AS [93]**). That is this case (**AS [101]**).

47 Woodside itself characterises the air emissions conditions attached to the final approval as "new" (**WS [119]**) and points to the Department advising the Minister that the effect of imposing these final conditions caused a higher likelihood of the action having an impact on the NHP in the short term (**WS [123]**). That acceptance, for the purpose of Ground 3, is sufficient to establish the Department erred and that error has infected the Minister's decision-making as he was not prompted to form the requisite state of satisfaction at the relevant time (ie, on or around 12 September 2025) (**AS [99])**.

48 Both Woodside and the Minister highlight passages in the Minister's reasons that are said to explain the basis upon which he decided to change the conditions on the approval (**WS**

[120]-[121]; MS [31]). The Applicant submits the reliance on these passages does not demonstrate that the Minister "in reality" formed the state of satisfaction required by the applicable law (**AS [109]-[110]**).

49 For completeness, the Applicant notes that for the purpose of establishing the error alleged in Ground 3 it is irrelevant:

49.1 the Legal Considerations Report contemplated the possibility the air emissions conditions might change (cf **WS [117]**);

49.2 why Woodside alleges the Department changed Proposed Condition 3 (cf **WS 122]**);

49.3 why the Minister said he changed Proposed Condition 3 in his reasons (that issue is relevant to Ground 5) (cf **WS [120]-[121]**);

49.4 why Woodside alleges the Department and the Minister considered the PhD research providing more evidence of the impacts to the rock art (addressed at AS [100.2]) (**WS [125]**). The Applicant does not submit the Minister had to give a particular weight to that research when he considered whether to approve the NWSx Project (cf **WS [126]**).

49.5 why Woodside alleges the Department and the Minister considered the further submissions provided by the Applicant following the making of the Proposed Decision. The Applicant does not submit that the Minister had to give a particular weight to that material when he considered whether to approve the NWSx Project (cf **WS [126]**) whether the Department adequately explained the reason for the imposition of each final condition such that the Minister did form the state of satisfaction required by s 134 (that issue is relevant to Grounds 4 and 5) (cf **WS [127]**).

D.2 Ground 4

50 Woodside's constructional submission on Ground 4 is directed only to the Minister's power to impose conditions under s 134 (**WS [129]-[133]**). For the same reasons addressed above, the Applicant contends this fails to grapple with the interrelationship between ss 130, 133 and 134 (conditioned by s 136) and the nature of the error alleged.

51 Focusing on the text of s 134(1) and (2), Woodside submits “there is no basis in the Act to require the Minister, as a prerequisite to attaching conditions under s 134, to ‘identify what the impacts of approving the taking of the action are on the protected subject matter – either if the action is approved without any conditions or if the action is approved with conditions’”. For the reasons given at **AS [92]-[93]**, the Applicant contends there is such a basis and the reasoning of Jackson and Kennett JJ in *Gelorup Corridor* supports this construction.

52 Woodside then asserts at **WS [134]** that the Minister’s reasons demonstrate he in fact assessed whether the impacts of the proposed action were acceptable in light of the benefits that the action may bring, whether there were conditions that could mitigate those impacts and whether the residual impacts following the imposition of the conditions were acceptable. That assertion relies:

52.1 *First*, and peculiarly given Woodside’s express focus on the terms of s 134, on a passage in the reasons of Jackson and Kennett JJ in *Gelorup Corridor* where their Honours are clearly addressing the combined operation of ss 130, 133, 134 and 136.

52.2 *Second,* on its second argument on Ground 3 (**WS [114]-[127]**). As addressed at paragraphs 43-44 above, that argument appears to proceed on the incorrect premise that the Minister bifurcated his decision-making powers.

53 In support of its construction of s 134, Woodside relies upon statements in authorities of this Court that have considered the breadth of s 134. That issue is not pertinent to the error alleged in Ground 4 but is relevant to the error alleged in Ground 5 (as the Minister addresses at MS [38]-[42]). Thus, those authorities are addressed below.

D.3 Ground 5

54 Woodside attempts to cast Ground 5 as an irrelevant consideration error (**WS [110.3], [137]**). That is a mischaracterisation.

55 The Applicant does not contend that the Minister cannot have any regard to whether a condition is cost-effective or technically achievable or workable (cf **WS [138]**). It can readily be accepted that argument would be “absurd” because of the operation of

s 134(4)(b), as addressed at **AS [126]**. But that is not the error alleged and nor does the proper construction of s 134 the Applicant advances require such an approach (**AS [124]-[126]**).

56 In short, Ground 5 alleges the Minister either misunderstood the law or exercised his power under s 134(1) unreasonably when he attached Conditions 4-8 to the approval of the NWSx Project. The Ground requires the Court to construe the Minister's reasons to determine whether he asked himself the wrong legal question or otherwise exercised the power unreasonably (**AS [122]-[123]**).

57 As set out at **AS [53]-[56]**, the critical parts of the Minister's reasons are **SOR [171]-[176]**. At **WS [120]-[121]** (in the course of addressing Ground 3) Woodside submitted that **SOR [173]-[176]** is where the Minister "articulated three premises on which he would impose conditions" and **SOR [177]-[228]** set out the conditions which the Minister imposed on these bases. The Applicant agrees this is a fair reading of the Minister's reasons consistent with the principles set out above at paragraphs 15-16.

58 In Ground 5, Woodside adopts a different – and strained – approach to the construction of the reasons (**WS [141]-[142])**. In particular, the contention that the Minister "took into account (but did not necessarily accept) information provided by the proponent about its technical ability to reduce different types of emissions by specific amounts" relies on paragraphs of the reasons (**SOR [186], [187], [191], [201]-[204]**) that are *not* directed to the premises upon which the Minister imposed the air emission conditions. Further, this construction of the Minister's reasons does not provide an intelligible justification for why the Minister was satisfied these conditions met the requirement in s 134(1) in the factual context of this exercise of the power. (The basis for the contention at **WS [142]** that the Applicant's submission is "beyond the scope of the application" is unclear.)

59 By contrast, the Minister's response to Ground 5 contends:

59.1 *First*, that the Applicant's characterisation of the reasons is inaccurate because in fact, the "practicability of compliance was a factual matter discussed along the way to forming [the ultimate] conclusion" (**MS [37]**). That submission is advanced without reference to the paragraphs of the Minister's reasons and should be rejected.

59.2 *Second*, the Minister takes issue with the Applicant's construction of s 134 (**MS [38]-[42]**).

In that regard the Minister refers to the reasons of Besanko J in *Buzzacott* that "the power of the Minister to impose conditions on an approval of a controlled action is very wide".[41]

60 The Applicant does not take issue with the correctness of this observation (which is also relied upon by Woodside at **WS [130]**) but highlights that the issue in *Buzzacott* was relevantly different from the issue raised here. Specifically, *Buzzacott* addressed arguments that certain conditions on an approval individually and collectively rendered the Minister's approval impermissibly uncertain contrary to s 5(2)(h) of the *ADJR Act*.

61 In *Buzzacott* the applicant's argument at first instance (and on appeal) had two limbs.[42]

62 First, there were conditions on the approval the content and effect of which depended on a determination to be made in the future either by the second respondent (a private corporation) or by the first respondent (the Minister) or by both of them. In the case of these conditions, the applicant contended the effect of the conditions could not be seen until further processes were undertaken. It was therefore submitted that there were so many conditions which dealt with proposed plans or studies that the result of the exercise of the power was uncertain. Second, the applicant submitted that there were conditions which envisaged significant aspects of the proposed action being designed or determined at some later stage and it was contended that was, in effect, a "provisional" approval not envisaged by the *EPBC Act*.

63 Besanko J rejected both contentions. As part of his reasons his Honour noted that conditions to be imposed are an integral part of the decision to approve,[43] and that conditions managing the impacts of an approved action (referring to the words of s 134(3)(e)) are broad enough to encompass significant variations and additions to conditions. His Honour found that the conditions in that case were sufficiently certain

41 [2012] FCA 403; (2012) 291 ALR 314 at [58].

42 *Buzzacott* [2012] FCA 403; (2012) 291 ALR 314 at [34]-[35] (Besanko J). On appeal: *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111; (2013) 215 FCR 301 at [138] (Gilmour, Foster and Barker JJ). See generally *Gelorup Corridor* [2023] FCAFC 139; (2023) 299 FCR 236 at [45]-[55] (Jackson and Kennett JJ).

43 [2012] FCA 403; (2012) 291 ALR 314 at [57], referring to the Full Court's reasons in *Lawyers for Forests Inc. v Minister for the Environment Heritage and the Arts* [2009] FCAFC 114; (2009) 78 FCR 38 at [54] (Sundberg, Dowsett and Jacobsen JJ).

(for the purpose of s 5(2)(h) of the *ADJR Act*) as it was reasonably clear to the proponent was what was required for it to do.[44]

64 On appeal, the Full Court held in respect to the first argument that individually and collectively the conditions were not beyond the power conferred under s 134 and, in respect of the second argument, that when taken together the range of conditions did not suggest that the approval granted was invalid for lack of certainty.[45]

65 The Applicant's contention is not that Pt 9 does not permit some scope for a proposed action to be approved subject to conditions that allow decisions to be made on particular issues at some later times. As recognised by Jackson and Kennett JJ in *Gelorup Corridor*, s 134(3)(d)-(f) envisage conditions of that kind in that these sub-provisions allow impositions of requirements for auditing, monitoring and the development of plans.[46] The Minister's imposition of the air emissions conditions on the approval of the NWSx Project are plainly not conditions of that kind.

66 Here, the Minister accepted that conditions reducing air emissions from the proposed action were necessary to prevent irreversible damage to the MNES.[47] He also accepted that the current operations of the NWS were causing impacts to the MNES.[48]

67 Neither Woodside nor the Minister point to anything in the text, context and purpose of s 134 or the authorities that supports the contention that a Minister's task when deciding whether to a condition of that kind is to ask themselves whether they are satisfied that the proposed condition is "feasible" for a proponent such that attaching that condition would not prevent the proposed action from being approved. The Applicant contends that is how the Minister purported to exercise the power in this context (**AS [126]-[127]**).

44 *Buzzacott* [2012] FCA 403; (2012) 291 ALR 314 at [59] (Besanko J).
45 *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCAFC 111; (2013) 215 FCR 301 at [223], [230], [264] (Gilmour, Foster and Barker JJ).
46 *Gelorup Corridor* [2023] FCAFC 139; (2023) 299 FCR 236 at [53] (Jackson and Kennett JJ).
47 SOR [132], [151]
48 SOR [102]-[104].

E. GROUND 6

68 The three reasons which Woodside proffers (and which the Minister adopts) against the Applicant's construction of s 137A are incorrect individually and cumulatively (**WS [149]-[174]**; **MS [45]**).

69 *First*, s 137A does create a condition on the Minister's decision-making power in ss 130 and 133 of the *EPBC Act* so as to meet what Woodside terms the "objectivity element" (**WS [150]**).

69.1 Woodside's attempt to sidestep Gageler J in *Plaintiff M96A* on the basis that the *Migration Act* is a different statutory scheme is unpersuasive (**WS [158]**). Moreover, it fails to address the key point of principle set out from *Plaintiff M96A* at **AS [135]**: that if Parliament wished to make the exercise of power turn on a particular state of mind, rather than an objective set of circumstances, there are well-established drafting techniques of which it is aware, and which have not been deployed in s 137A.

69.2 The language of s 137A is not "circuitous" (cf **WS [159], [166]**) nor focused on "conduct" in a way that can sever the link between the decision and the decision-making. The "conduct" is the decision-making: that is rooted in the statutory text of s 137A through the opening language of that provision as "In deciding whether or not to approve". The decision-making required by ss 130, 131, 133 and 134 either is inconsistent with, or not inconsistent with, the National Heritage Management principles. That is a criterion of the Minister's jurisdiction which is capable of objective ascertainment. That is not to "cut across" the Minister's decision-making but is properly within the function of judicial review (**WS [169]**). Moreover, the context and purpose of the *EPBC Act* support this construction. Section 137A is contained in Subdiv B of Part 9, which is headed "Considerations for approvals and conditions". It is a *requirement* that must be observed by the Minister in order for there to be a lawful exercise of power under Subdiv A of Pt 9, relevantly under ss 130, 133(1) and 134(1) of the *EPBC Act*.

69.3 That the formulation of "not inconsistent with" may be "softer" than some other formulation which requires positive consistency with the National Heritage Management Principles is not to the point. If the Minister acts inconsistently with the Principles, he does not have power to approve the proposed action. That is the essence of a jurisdictional fact (see **AS [134]-[136]**).[49] Woodside fails to engage both with that essential characterisation and the High Court authority on that in *Gedeon v Commissioner of the New South Wales Crime Commission* (see **AS [142]**).

70 *Second*, and relatedly, the construction of s 137A as an objective condition on the Minister's power coheres with the nature of the statutory task (cf **WS [162]-[174]**). Merely because decision-making is evaluative does not mean that there can be no objective jurisdictional facts which delimit the decision-making.

71 So much can be illustrated by comparing the way in which the High Court held that s 198A(3) of the *Migration Act 1958* (Cth) presented objective jurisdictional facts in *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.[50] Section 198A(3) was as follows:

> The Minister may:
>
> (a) declare in writing that a specified country:
>
> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
>
> (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
>
> (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
>
> (iv) meets relevant human rights standards in providing that protection; and
>
> (b) in writing, revoke a declaration made under paragraph (a).

72 The joint judgment of Gummow, Hayne, Crennan and Bell JJ recognised that persons who were liable to removal from Australia under the *Migration Act* "can be taken to another country *only* in accordance with s 198A" and that the "generality of the power apparently conferred by s 198 [the removal power] must be confined by reference to the

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49 *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135; *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; (2008) 236 CLR 120.

50 [2011] HCA 32; (2011) 244 CLR 144.

restrictions set out in s 198A".[51] The decision-making and the decision thus folded into one single question. In characterising the matters set out in s 198A(3)(a) as objective jurisdictional facts, the plurality held that these were the kinds of protections "that Australia undertook to provide by signing the Refugees Convention and the Refugees Protocol" such that these criteria were a "reflex of Australia's obligations".[52] That is, although the criteria were evaluative such as the assessment of "effective procedures for assessing [a person's] need for protection", they were anchored to legal documents which the Court could assess.

73 Similarly, here, s 137A presents the criterion of acting not inconsistently with the prescribed National Heritage Management Principles. Those are defined and capable of objective ascertainment by the Court. Woodside's contention that s 137A cannot be an objective jurisdictional fact because it presents criteria that are not "readily susceptible of objective determination" (**WS [163]**) accordingly goes nowhere. Equally, its contention that s 137A cannot be an objective jurisdictional fact because it is located in Subdiv B of Div 1 of Pt 9, rather than Subdiv A which contains the decision-making powers of ss 130, 131, 133 and 134 is not to the point. Plainly, the matters set out as "Requirements" in Subdiv B constrain how, and in what circumstances, the powers set out in Subdiv A can be exercised. Textually, the Subdivisions plainly interrelate. Section 136 is located in Subdiv B (which both Woodside and the Minister accept limits the Minister's powers under ss 130, 133 and 134). Section 136(1) provides that the Minister must consider the mandatory considerations "s*o far as they are not inconsistent with any other requirement of this Subdivision*" (emphasis added). Woodside's reliance at **WS [172]** on *Northern Inland Council for the Environment Inc v Minister for the Environment* is also misplaced.[53] That case notes only that the provisions in Subdiv B must be construed harmoniously, relevantly so that the consideration in s 139(2) cannot be used to override the prohibition on consideration of other matters in s 136(5). It says nothing relevant to determine whether s 137A presents an objective jurisdictional fact.

74 *Third*, while it is not necessary for the Court to find that the decision in *Rainforest Reserves Alliance* must be followed (see **AS [145]**), if the Court considers that it is so

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51 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 at [95] (Gummow, Hayne, Crennan and Bell JJ).

52 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 at [118] (Gummow, Hayne, Crennan and Bell JJ).

53 [2013] FCA 1419; (2013) 218 FCR 491 at [81] (Cowdroy J).

necessary, the Applicant submits that the Court should hold that, for the reasons given above at paragraphs 69-73 and at AS [137]-[142], there is a compelling reason to depart from that decision in the present case, in that the decision is "plainly wrong". There are no prescriptive rules pursuant to which a coordinate judge's decision should not be followed for being clearly or plainly wrong.[54] For the Court to hold that *Rainforest Reserves Alliance* is plainly wrong is not to say that it is "obviously wrong". Rather, the qualifier reflects the concern about judicial comity here as between single judges of this Court.[55]

F. GROUND 7

75 The Applicant highlights the key contention in Ground 7 is that the Minister did not form the requisite state of satisfaction under s 137A because he relied upon the Legal Considerations Report. The relevant analysis and recommendation of which was directed at the proposed conditions for the Proposed Decision rather than the (materially different) Final Conditions.

76 This contention relies upon the same facts addressed in relation to Grounds 3 and 4 regarding the deficiencies in the Department's advice to the Minister.[56] In that regard, the Applicant also notes the Department did not mention or provide any further advice on the subject matter of s 137A in its recommendation submission given to the Minister on 9 September 2025.

77 As such, the Applicant submits the Court can infer that the Minister relied upon the (materially outdated) Legal Consideration Report in purportedly forming his state of satisfaction under s 137A.

78 In support of this contention, the Applicant submits that the Minister's statement of reasons does not provide any support for the Minister having lawfully formed the state of satisfaction or that he had a rational basis to be so satisfied (**AS [147]-[151]**).

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54 *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2007] FCAFC 157; (2007) 162 FCR 234 at [86].

55 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153; (2021) 287 FCR 181 at [2]-[9] (Allsop CJ).

56 See Amended Application, Ground 7 particulars (c), (d), (f).

79 Woodside's submissions are predominantly directed at seeking to establish the Minister's reasons have an intelligible justification for his conclusion on s 137A and largely fail to engage with the key factual contentions (apart from the general assertion at **WS [185]** that the Department's recommendation submission and the WA EPA's Assessment Report provided "an ample basis" for the reasoning concerning the s 137A requirement). But that supposedly "ample" basis did not even refer, for instance, to the *Murujuga Cultural Landscape: Strategic Management Framework*, which had been entered into by each of the Commonwealth and Western Australia in 2022.[57] That Framework acknowledges the national and coordinated approaches to ensuring that National Heritage and World Heritage requirements are met, by recognising the interplay between the various management plans and strategies, including *but crucially not limited to* the Murujuga National Park Management Plan referred to by the Minister at **SOR [189**] (Attachment F92).[58]

80 In relation to the arguments addressed to the Minister's statement of reasons, Woodside's recounting of the Minister's decision-making process at **WS [181]** (to which the Minister does not add given **MS [46]**) is not materially different to what is outlined at **AS [148]-[149]**.

81 It is at **WS [184]-[185]** where Woodside seeks to step in to reframe the Minister's reasoning at **SOR [294]** that it goes awry. There are two responses to Woodside's purported reframing of the Minister's reasoning.

82 The first is that the Minister's "agreement" with the Department is not "independent of, and in addition to" his preceding analysis. There was no analysis which preceded that paragraph of his reasons; the earlier paragraphs are merely descriptive. The entirety of the Minister's evaluation is purported to be contained in **SOR [294]**. In circumstances where that paragraph is effectively identical to the relevant paragraph in the LCR without having grappled with the changes reflected in the Final Conditions, it cannot be said that the Minister's agreement was in any way independent of or additional to the Department's assessment of the lack of inconsistency.

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57 *Murujuga Cultural Landscape: Strategic Management Framework* (October, 2022) at 16-17, and see generally at 21-22.

58 *Murujuga Cultural Landscape: Strategic Management Framework* (October, 2022) at 2-3, 23 (Table 2).

83 The second response is that to identify that **SOR [294]** contains all of the dispositive reasoning attempted by the Minister with respect to s 137A is not to read that paragraph in isolation (cf **WS [185]**). The consideration at **SOR [293]** does not supply a rational basis or an evident or intelligible justification for the Minister being satisfied that his decision-making was not inconsistent with the National Heritage Management Principles. The Minister merely asserts the appropriate management of impacts on the Murujuga Cultural Landscape, petroglyphs, Indigenous heritage sites and social surrounds as being "appropriately managed by the WA conditions and the conditions imposed by my decision". He then goes to describe the WA conditions and otherwise agrees with the Department. That is to say, as to "the conditions imposed by [his] decision", being the Final Conditions, the only basis he supplied for being satisfied that he complied with s 137A was the Department's view. That view was not connected to the Final Conditions.

G. MATERIALITY IS ESTABLISHED

84 Finally, Woodside agitates that errors, particularly as to Grounds 2 and 7, would not be material. That contention is inconsistent with the High Court's clarification as to what materiality demands in *LPDT* and which was then further elaborated upon by the Full Court of the Federal Court this year in *SSVJ*, particularly where the Respondents not only accept but emphasise that the decision-making here is evaluative (**WS [43]-[44]**, **[77]**, **[163]**; **MS [9]**). Two matters of principle bear emphasis.

84.1 *First*, in some cases the nature of the error will necessarily satisfy the requirement of materiality. That is so where the potential for an effect on the ultimate decision will be inherent in the nature of the error: legal unreasonableness in the final result is an example of that kind of error.[59] So too (at least arguably) is a finding of irrationality in the formation of a state of satisfaction.[60] In any event, where an impugned finding is sufficiently central or a significant element in the chain of reasoning to the formation of a state of satisfaction any finding of irrationality or illogicality will be a material error.[61]

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59 *LPDT* [2024] HCA 12; (2024) 280 CLR 321 at [6] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

60 *SSVJ* [2026] FCAFC 45; (2026) 315 FCR 435 at [50] (Perry, Kennett and Shariff JJ).

61 *SSVJ* [2026] FCAFC 45; (2026) 315 FCR 435 at [50] (Perry, Kennett and Shariff JJ).

84.2 *Second*, where an error by a statutory decision-maker is a breach of a condition governing the process of reasoning to be undertaken in exercising a decision-making power that involves an evaluative assessment, materiality is established by no more than tendering the decision-maker's reasons.[62] That is because it would involve improper speculation for a Court to attempt to discern how the decision-maker (here, the Minister) would have reasoned if he had not departed from the required process of reasoning.[63]

85 In light of the above principles, if any or all of the Grounds (including Grounds 2 and 7) are established they fatally infect the Minister's evaluative task under the *EPBC Act*. Applying *LPDT*, for the grounds which have a threshold of materiality, there is a realistic possibility that the evaluative conclusion reached by the Minister could have been different had there been no error.[64] Thus, the threshold of materiality is met.

Date: 7 July 2026

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62 *LPDT* [2024] HCA 12; (2024) 280 CLR 321 at [11] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), [42] (Beech-Jones J).

63 *LPDT* [2024] HCA 12; (2024) 280 CLR 321 at [36] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

64 *LPDT* [2024] HCA 12; (2024) 280 CLR 321 at [35] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).