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

No: VID 1356 OF 2025

AUSTRALIAN CONSERVATION FOUNDATION INC
Applicant

MINISTER FOR THE ENVIRONMENT AND WATER
First Respondent

WOODSIDE ENERGY LTD (ACN 005 482 986)
Second Respondent

APPLICANT'S REPLY

A. INTRODUCTION

1. These submissions reply to:

   a. the submissions of the Second Respondent (**Woodside**) dated 9 June 2026 in this proceeding;

   b. the submissions of the First Respondent (**Minister**) dated 23 June 2026 in this proceeding; and

   c. where indicated in Part E, to Woodside and the Minister's submissions in VID1400/2025.

2. Abbreviations follow the Applicant's submissions dated 20 April 2026. The reply addresses each ground in turn.

B. GROUND 1 — ECONOMIC BENEFITS OF THE BROWSE DEVELOPMENT

3. Woodside advances three principal answers to Ground 1:

   a. first, that properly construed, the Minister's reasons do not show that he took the combined economic benefits of the NWS Project Extension and the proposed Browse Development into account "in the manner contended" (WS [45.1], [52]–[53]);

   b. secondly, that even if he did, s 136(1)(b) permitted it (WS [45.2], [63]–[69]); and,

   c. thirdly, that any error in taking the impermissible matters into account was immaterial.

4. The Minister's answers overlap with Woodside's first and second answers. They are:

   a. first, that ACF misconstrues the Minister's reasons, which were "caveated and conditional" in respect of the proposed Browse Development: MS [7]–[13]; and

   b. secondly, that the Minister was entitled to take into account the economic benefits of the Browse Development if that project were approved: MS [14]–[21].

5. For the following reasons, each of the Respondents' answers should be rejected.

B.1 The Minister did rely on the combined benefits

6. The Reasons speak for themselves. At [250] the Minister found that "the proposed action <u>would result in</u> significant economic benefits" (underlining added), supported by (among other things) the economic benefits of the NWS Project Extension and the proposed Browse Development

combined: Reasons at [250(c)]. At [251], he treated the proposed Browse Development as "demonstrat[ing] the long-term value of this facility" (underlining added). Thus the benefits of the two actions were attributed to one. The Reasons show, in terms, that the Minister took "into account the combined benefits that would flow if both the NWS Project Extension and the proposed Browse development were approved and went ahead" (cf WS [61]). Pointing out the Minister's express language is not to construe his reasons with an eye keenly attuned to error. To the contrary, it is to construe his reasons according to their terms and tenor, without any gloss whatsoever.

7. Notwithstanding this, Woodside says that the Minister used "the language of estimation" and "understood that the proposed Browse development may not proceed" (WS [76]), and the Minister says that the Reasons show he "was noting the potential benefits of the NWS Extension Project plus the Browse to NWS project, if that latter project were approved" (MS [8]; underlining added), and that the Browse Development was simply "one of [the] potential sources" of necessary third-party gas (MS [11]–[12]). But even if the Minister did understand that the Browse Development may not be approved, or if he had a "logical basis" for considering that gas might in future come from the Browse basin (MS [11], [13]), that is not germane to the point. ACF's core complaint is that the Minister conflated two actions that ought to have been assessed separately. The fundamental problem is not that he counted, in favour of approving this action, benefits that were "estimated" or "potential"; it is that he counted benefits that belonged to a different action. The "potential" benefits of the Browse action ought not to have been weighed in favour of the NWS Extension action, because the actions are different and ought to have been assessed separately on their own merits.

8. Further, there is an important tension between Woodside's first two answers. If the combined figures truly played no part, the lengthy defence of the Minister's entitlement to rely on them (WS [54]–[74]) is unnecessary. And on Woodside's own account (WS [51]–[52]), Woodside drew the combined assessment to the Minister's attention precisely because the historic NWS-only information "[would] not be representative of future scenarios, including scenarios involving additional gas resources". On Woodside's case, the combined figures were the only forward-looking economic material before the Minister. It is not open to Woodside now to describe them as a mere decoration, immaterial to his reasoning (see further § B.3 below).

B.2 Section 136(1)(b) does not permit reliance upon benefits of a separate action

9. Woodside (WS [63]) recasts the Applicant's construction as an "implied exception" under which any matter must be disregarded if it "also pertains to a separate action". That is not ACF's case.

Matters may relate to an action through its relationships with other activities (for example, demand for processing capacity generally), but what s 136(1)(b) does not permit—at least where multiple actions are kept separate and not combined, as here—is consideration of the economic benefits of a <u>different</u> action as such—benefits which, by definition, accrue only if that other action is separately approved. The combined figures were of that character: an assessment, procured by Woodside, of the estimated benefits of the NWS Project Extension and the Browse Development together.

10. The Minister contends that ACF must "demonstrate that the potential economic benefits contributed by an unapproved project was a mandatory irrelevant consideration" (MS [14]). But that is not so. The Minister's contention misconstrues ACF's complaint as fastening upon the fact that the Browse action considered "potential" economic benefits of an unapproved project. But, in fact, what ACF's complaint fastens upon is that the Minister was not permitted to consider the hypothetical economic benefits of the unapproved Browse Development *as if they were* actual economic benefits that would result from this action.

11. The breadth of s 136(1)(b) (WS [55]–[58], [65]–[66]; MS [15]–[16], [21]) is accepted but is not the issue. Even the broadest statutory consideration takes its content from the subject matter, scope, and purpose of the Act, and s 136(5) expressly prohibits consideration of matters outside Division 1. The textual anchor to ACF's contention is the chapeau to s 136(1): the matters are mandatory considerations "[i]n deciding whether or not to approve the taking of *an action*"—the action before the Minister. Every description of the exercise in the authorities is to the same effect: *Gelorup* at [93] speaks of weighing the impacts of the proposed action against "the social and economic benefits of *the proposed action*" (emphasis added). Woodside's dismissal of that passage as "descriptive shorthand" (WS [59]) tacitly concedes that no authority describes the exercise in the way Woodside requires.

12. Further, the issue is anterior to "weight" (WS [66]). The issue is whether the benefits of a separate, unapproved action answer the statutory description of "economic and social matters" relating to "the taking of an action"; not whether those benefits deserve great or little weight in the evaluative exercise.

13. As for the Minister's contention that "economic matters" may involve economic detriments (MS [18]), the contention is beside the point and, if anything, supports ACF's construction. If a proponent's action were rejected on the basis of "potential" economic detriments said to come from a separate, unapproved action, that proponent would be justified in making the same point here, just in reverse.

14. As for the "gerrymandering" point, it stands unanswered. The Act contemplates a process for judging separate but related actions together. Sections 70 and 74A expressly allow the Minister to call all of the components together and assess the whole. The invocation of s 74A (WS [67]–[69]) supports ACF, not Woodside: where the components are not called together, each proceeds separately for all the purposes of Parts 7 to 9. What the scheme nowhere contemplates is the asymmetric hybrid adopted here: environmental impacts assessed action-by-action but economic benefits aggregated across actions. Also, the fact that the split-referral decision was not challenged (WS [69], MS [20]) is beside the point: ACF does not impugn the split; it holds the Minister to its consequences.

15. The double-counting consequence (ACF [190]) is also unanswered: on Woodside's construction, the same combined benefits may be weighed *again* in support of the Browse approval — counted twice, in favour of two actions whose environmental impacts are never weighed together.

16. As to the contingency point, WS [72]–[74] fairly observe that s 136(1)(b) accommodates forward-looking and uncertain matters and prescribes no likelihood threshold. But ACF's point is that benefits which are contingent on the Minister's own future exercise of statutory discretion stand in a different category than ordinary commercial contingency: to give such benefits positive weight now is to assume—and to that extent to prejudge—the outcome of a statutory decision yet to be made (ACF [192]). Neither Woodside nor the Minister offer an answer to the prejudgment point, as a matter of law: WS [75]–[76] and MS [8]–[13] address only the "*fait accompli*" characterisation.

B.3 The materiality objection fails

17. The test for materiality is whether "there is a realistic possibility that the decision that was made in fact *could* have been different if the error had not occurred" (emphasis in original): *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; (2024) 280 CLR 321 at [7] (cited at WS fn 81). The combined figures the Minister took into account were far greater than the NWS-only figures: \$6.6 billion annually to 2063, \$36 billion in capital expenditure and approximately \$63 billion in estimated taxation and royalties, as compared with NWS-only figures of A\$1,788 million annually (WS [78]). Further, the figures fed directly into the Minister's dispositive finding at Reasons [310] that any likely short-term impact on the National Heritage place "would be small and therefore outweighed by the social or economic factors". The far greater economic benefits of the combined assessment, as compared with the NWS-only assessment, cannot be regarded as of no consequence to the decision actually made. Where the impugned matter formed a major component of one side of a

closely-weighed balance, a realistic possibility of a different outcome cannot be excluded. WS [78]–[79] in substance invite the Court to perform the weighing for itself; but that exercise belongs to the Minister on remittal.

C. GROUND 2 — INDETERMINACY OF THE ACTION

18. Woodside's answers to Ground 2 are:

    a. the action was identified with sufficient certainty (WS [100]);

    b. the impact pathway was identified with sufficient certainty (WS [101]);

    c. the residual uncertainty was bounded by the plant's "design envelope" (WS [102]);

    d. the conditions manage what remains (WS [103]–[104]); and

    e. there is no collapse of the action/conditions distinction (WS [105]).

19. The Minister largely addresses Ground 2 together with Ground 3. In respect of Ground 2, his main answer is that ACF "overstates the significance to the Minister's reasons of the potential changes in quantity and composition of third-party gas" (MS [26]).

20. ACF's reply to both can be addressed as follows.

C.1 The "boundaries" the Respondents identify are the boundaries of the conditions, not of the action

21. The action approved is the long-term processing of gas and fluids. What is to be processed, from where, in what quantity and of what composition remains unknown.

22. Woodside (WS [100]) identifies the boundaries of the action as "emissions from the Karratha Gas Plant, of identified compounds, into a defined airshed, over a defined period". That is a description of the emission caps attached as conditions—the control envelope—not of the action.

23. The Minister, similarly, does not attempt to define the action. He focuses more attention on the content of the conditions, and the Minister's process of reasoning in achieving them (which is more directed to Ground 3) (MS [27]–[42]). The point is made that the Minister identified impacts and identified conditions to manage them (MS [27], [35]), and that ACF's "argument pays no attention to how these caps [in the conditions] operate to negate any uncertainty about the inputs of feed gas" (MS [40]).

24. But in both cases, to define the approved action by reference to whatever can be processed within emission caps is to define it negatively (ACF [198]), and concedes the very collapse of the action/conditions distinction that WS [105] and MS [201] denies: the exemption from the Part 3 prohibitions, whose boundaries are the boundaries of the action (*Gelorup* at [58]), is given no content other than by the conditions.

25. The remaining descriptors at WS [100]—proponent, facility, activity-type, temporal scope, and an LNG production capacity of 18.5 Mtpa—do not meet the point. The capacity of the plant is not the quantity or composition of the feedstock, and "third party gas and fluids" is the very element left undefined.

C.2 The "design envelope" answer glosses the Minister's own findings

26. WS [102] relies on a Decision Brief document (Document F59) for the proposition that any third-party feedstock must be "similar in nature" to NWS reserves, and asks that the Minister's acknowledgment at Reasons [106] be "read in that context". But the Minister's finding was unqualified: the proponent's ERD "provides limited information on the total emissions quantity and quality for the proposed action" and "the degree of emissions similarity or difference is unknown for third party gas providers" (Reasons [106]; see also [212]). The decision falls to be reviewed on the reasons the Minister gave. Woodside's gloss is an *ex post* reconstruction from material the Minister did not adopt; if the design envelope truly confined the feedstock in the manner now suggested, the Minister—who found the opposite—could have so found.

C.3 The authorities concern uncertain impacts of determinate actions

27. None of Woodside's authorities (WS [95]–[97], [104]) meets the Applicant's point. *Lawyers for Forests* concerned a pulp mill at a known site with a known effluent discharge: the conditions managed scientific uncertainty as to the impacts of a determinate action. *Buzzacott FC* concerned a mine-closure plan whose detail was left for later approval: the mine itself was determinate. *Ulan* concerned a water-supply condition under different (NSW planning) legislation. In none was the essential subject matter of the action unknown at approval. This is a facility that will process "gas and third party fluids" and, beyond that, the Minister was frank that he did not know what would be processed there.

28. The distinction is between uncertainty as to the consequences or impacts of a known action, which conditions may manage, and indeterminacy in the content of the action itself, which conditions cannot cure (cf MS [25]). *Gelorup* at [58] requires the action itself to have "some degree of stability" and identifiable boundaries at approval. This action does not meet that test.

C.4 The caps-cover-the-field submission misses the point

29. WS [103] reasons that if processing future third-party feedstock would produce emissions exceeding the caps, "that processing cannot lawfully proceed". The Minister's submissions make similar points about the limiting and controlling effect of the conditions, where the Minister has concluded that the impacts are from "air emissions" (MS [35]–[41]). The logic of each assumes that the capped compounds capture every relevant emission of every possible feedstock. The capped compounds are those identified from the existing operation; whether they exhaust the emissions profile of unknown future compositions is precisely what the Minister found could not be assessed (Reasons [106]).

30. Conditions presuppose assessment; they cannot replace it. As the Full Court observed in *Gelorup* at [64]: a necessary step is the assessment of whether the impacts are acceptable and, if not, whether conditions can be devised to make them acceptable. Where the action is indeterminate at its core, that sequence cannot rationally be undertaken (ACF [201]–[202]). That is what ACF means by "collapsing the distinction" between an action and its conditions (cf MS [25]). Woodside's "regulatory architecture" submission, taken to its logical end, would permit the approval of any action, however undefined, so long as outputs were capped, which is to substitute licensing of an emissions budget for the assessment and approval of an action for which the Act provides.

D. GROUND 3 — LEGAL UNREASONABLENESS

31. WS [89] describes Ground 3 as "parasitic on Ground 2". That is wrong. Ground 3 has two limbs which are independent of Ground 2: the conditions-satisfaction limb (no rational basis for satisfaction that the conditions, in totality, would make the impacts acceptable) and the economic-benefits limb (ACF [203]–[206]). Both would remain even if the action were held sufficiently determinate.

32. The Minister's answer to Ground 3 is that ACF's case downplays *how* the Minister considered that all the conditions would manage uncertainty about the impacts from new sources of gas (MS [26]). Having considered the detail of the conditions, it is said, "there was clearly an evident and intelligible justification for the Minister's conclusion" that "the application of stringent emissions reduction conditions means the action will not have an unacceptable impact" (MS [42]).

33. The *Li* test is accepted (WS [106]; MS [42]). The question is whether the Minister had "an evident and intelligible justification" for his decision in circumstances of acknowledged

ignorance of the emissions to be controlled (Reasons [106]) and of the relationship between emissions and damage (Reasons [176]), for an approval running to 31 December 2070.

D.1 The three premises do not support the conclusion

34. The premises of the Minister's reasoning were (Reasons at [176]):

a. gases arising from the action are likely to impact rock art;

b. while the precise relationship between emissions and damage is not well understood, fewer emissions are likely to have a lower impact; and

c. the conditions should impose the lowest volume of emissions which can feasibly be set while still allowing the action to occur.

35. WS [108] describes this as "a coherent and intelligible chain of reasoning", and the Minister seems to say that it was entirely logical to impose caps on emissions in circumstances where there was an "absence of information about the composition of emissions" (MS [31], [34]). But the premises establish, at most, that the conditions reduce the impact. They say nothing about whether the residual impact is acceptable. The conclusion ultimately drawn—that "any likely short-term impact on the NHP would be small and therefore outweighed" (Reasons [310])—does not follow from premises which include that the relationship between emissions and damage "is not well understood". The step from "lower" to "small" is nowhere bridged in the Reasons. Identifying that gap is not a merits complaint; it is the identification of the missing intelligible justification.

36. The third premise makes feasibility—feasibility for the proponent—rather than protection of the National Heritage values the operative constraint on the conditions. On the evidence, "feasibility" was supplied by the proponent's assertions in the conditions negotiation, in circumstances where the Department's expert adviser (ECASS) had advised that NOx reductions in the order of 90–95%, and up to 98%, were achievable with current technology (ACF [264]), and where the Reasons do not explain why the conditions originally proposed—inferentially considered by the Minister to be "necessary or convenient" (s 134(1))—ceased to be so, otherwise than by reference to Woodside's objections (ACF [250]; Reasons [162], [171], [175]–[176], [194(a)], [195]).

D.2 The economic-benefits limb

37. WS [110]–[111] contend that it was not irrational to rely on the materials before the Minister as "indicative of future economic benefit", and that long-horizon projects do not admit of

arithmetical precision. ACF does not demand arithmetical precision (cf WS [111]). Its point concerns the character of the material. On Woodside's own account (WS [51]–[52]), it comprised: (i) historic and contemporaneous NWS-only information which Woodside itself told the Minister "[would] not be representative of future scenarios, including scenarios involving additional gas resources"; and (ii) the combined Browse-inclusive scenario, contingent on the separate approval of a different action (see Part B above). For an approval premised on transition to third-party gas processing until 2070, the finding of significant economic benefits therefore rested either on material unrepresentative by the proponent's own description, or on a scenario the Minister could not lawfully account for. That is the absence of rational foundation that Ground 3 alleges.

38. It is accepted that *Triabunna* (WS [111]) concerns flexibility in the identification of a proposed action between referral and approval, but it is to be emphasised that *Triabunna* says nothing about the rationality of a s 136(1) weighing exercise undertaken without a rational basis on one side of the scales.

39. The Minister simply submits that "there is also no factual basis" for this limb of Ground 3, and does not elaborate further (MS [43]). As a matter of fact, the Minister did not know what the future sources of gas and fluids would be at all, far less out to 2070. The contention, then, is that he had no evident or intelligible basis on which to be satisfied that the economic factors outweighed the environmental impacts (Reasons [310]).

E. GROUND 4 – "SUBSTANTIAL CAUSE" (SECTION 527E)

40. Woodside advances five answers to Ground 4 (WS [117]–[122]):

   a. first, a threshold point—that the relevant impacts of the action were determined before the Approval Decision and there was "no occasion" to revisit it (WS [118], [155]–[158]);

   b. secondly, that Ground 4 is "in truth" a factual attack, not a construction ground (WS [119]);

   c. thirdly, that "substantial cause" is largely a question of fact for the Minister (WS [120]);

   d. fourthly, that the Minister's reasoning was consistent with the text and the authorities (WS [121]); and

   e. fifthly, that the challenge is immaterial because only the second limb of the Minister's reasoning is attacked (WS [122], [192]–[194]).

41. These answers overlap with the answers given by the Minister. Accordingly, it is convenient to deal with both Respondents' answers by reference to those given by Woodside.

E.1 The threshold point: the "relevant impacts" of the action arose for determination, and were determined, at the approval stage

42. The contention that the s 527E issue "had been determined" by the Reconsideration Decision and could not be "revisit[ed]" (WS [118], [158]) is contradicted by the statutory text and by the Minister's own reasons, for three reasons.

43. Section 82(1) defines the "relevant impacts" of a controlled action both for the assessment and approval stages. Consideration of the type and extent of "relevant impacts" may occur at the assessment stage, but that does not mean that the issue is "determined" for the purposes of the approval stage. The contention that the Minister was neither "permitted, let alone required, to revisit" the type and extent of the "relevant impacts" of the proposed action at the approval stage has no anchor in the statutory text, and is contrary to it (see s 136(2)(e)).

44. Secondly, in any event, the Minister did decide the relevant impacts of the proposed action at the approval stage: Reasons [80], as Woodside accepts (WS [158]). Ground 4 attacks the Minister's refusal, in the decision presently under review, to take into account the climate-related impacts of the proposed action. Whether or not the Minister was required to revisit his earlier refusal in the Reconsideration Decision to take those impacts into account, he did decide in the Approval Decision to refuse to do so, and he did so by applying a misconstruction of s 527E.

45. Thirdly, the threshold point must be read with Woodside's futility point in VID1400 (s 78(3); WS1400 [8]–[11]). Taken together, the submissions assert that the construction of s 527E cannot be reviewed in this proceeding (because the issue belonged to the Reconsideration Decision), and that review of the Reconsideration Decision is futile (unless this proceeding succeeds). Their combined effect would be to immunise the Minister's construction of s 527E from judicial review altogether. That consequence tells strongly against both submissions, and Woodside's futility point is in any event, on its own framing (WS1400 [11]), wholly contingent on the failure of every ground in VID1356 and VID1357.

E.2 Ground 4 raises a question of construction, not merely of fact

46. Woodside's repeated answer—that "substantial cause" is "largely a question of fact for the Minister" (WS [120], [170])—is true but trite. Of course it is "largely" a question of fact; the issue is whether it is "solely" a question of fact. It is not and cannot be. Any question of fact is downstream of the question of law as to what is the proper construction of "substantial cause".

Where reasons disclose that a decision-maker made a factual determination on the basis of a misconstruction of a statutory phrase, the error is a legal one.

47. The Reasons disclose that the Minister did adopt a misconstruction of the statutory phrase. He reasoned that: the contribution of this action to the total amount of greenhouse gases in the atmosphere of the Earth is "very small"; "[i]t is therefore not possible to say that the proposed action will be a substantial cause" of the physical effects of climate change on MNES (Reasons [39](b); Reconsideration Reasons [163](b)). The words "therefore" and "not possible" treat proportional smallness, measured against aggregate global emissions, as legally conclusive. That is a ruling about what s 527E(1)(b) means, not a finding of fact within a correctly understood test.

E.3 The proper construction

E.3.1. "Substantial": same word, same Act, same decision

48. "Substantial", qualifying "cause" in s 527E(1)(b), bears its ordinary meaning: a cause of substance—real, and more than trivial, remote or fanciful—as distinct from a cause that is numerically predominant when measured against the totality of all contributing causes worldwide.

49. That is the meaning the Minister himself gave the same word, in the same Act, in the same decision, when he found the threshold of "substantial new information" met because the information "is of substance and is not trivial or inconsequential" (Reconsideration Reasons [152]; ACF [210](a)). The presumption that the same word bears the same meaning within the one statute is conventional, and nothing in s 527E displaces it. Woodside offers no account of why "substantial" should mean "of substance" when it qualifies "information" in ss 78(1)(a) and 78A, yet "proportionately large relative to global aggregates" when it qualifies "cause" in s 527E(1)(b).

50. Woodside's complaint that "qualitative" is not statutory language (WS [165]) is misdirected. The vocabulary is the Full Court's: *ECCQ FC* [46] ("whether the phrase had a *qualitative meaning* that could not, for example, be reduced to an arithmetical analysis"). The Applicant's construction is simply the ordinary meaning of the words Parliament used.

E.3.2. "Cause": attribution of responsibility, not market share

51. Woodside correctly frames causation as "the identification or attribution of responsibility", invoking common-sense causation principles and *Chappel v Hart* (WS [166]–[167]). But both

points tell against its argument. Attribution of responsibility is a contextual and evaluative exercise; it is the antithesis of an arithmetical share computation. And in every field of law from which Woodside draws—criminal law, negligence, statutory environmental offences—"substantial cause" and its cognates have never required that a contribution be numerically dominant within the total causal field. A wound may be a substantial cause of death though just one cause among several; an exposure may be a material cause of disease though a modest fraction of the total. Where harm is cumulative and indivisible, a requirement of numerical dominance would, for all practical purposes, entail that no greenhouse-gas-increasing activity causes any climate-related effect.

52. The negligence strand Woodside invokes makes the point exactly, although no party suggests that 'substantial cause' must be proven to a negligence standard. The test is whether the impugned conduct "materially contributed" to the harm, and a contribution is material if it is anything more than *de minimis*. The seminal statement is that of Lord Reid in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 621, a case in which the dust from the source the defendant ought to have controlled was the lesser of the two to which the worker was exposed, yet still a material cause of his disease: "What is a material contribution must be a question of degree. A contribution which comes within the exception *de minimis non curat lex* is not material, but … any contribution which does not fall within that exception must be material." The Federal Court applied that principle in the climate context in *Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796. Adopting the principle drawn from *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [25]–[26] and *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [45], Wigney J held that "[i]t is enough for liability that a wrongdoer's conduct be one cause", material contribution requiring "only that the … wrongdoer play some part in contributing to the loss" (*Pabai* at [150]–[151]). The threshold is qualitative—more than trivial—and says nothing of predominance.

53. *Pabai* is directly in point on the very step the Minister takes. Wigney J accepted, as the Minister accepted here (Reconsideration Reasons [160]; and see WS [126]), that "every greenhouse gas emission contributes to global warming and associated climate impacts" (*Pabai* at [1080]; see also [232], [266]). Twice, at the duty and breach stages, he rejected the Commonwealth's submission that, because Australia's emissions are "a tiny proportion of global annual greenhouse gas emissions", it could not be foreseen that a failure to reduce them might materially contribute to climate harm (*Pabai* at [886], [984]). And though Australia's emissions are a small fraction of the global total, his Honour accepted that "Australia's contribution to global greenhouse gas emissions in recent times has been significant and certainly cannot be described

as being *de minimis* or trivial" (*Pabai* at [1087]). Rightly, Wigney J held that the size of a contributor's share of the worldwide aggregate is not the measure of materiality. Yet, that is the precise inverse of the Minister's reasoning, which treats arithmetical smallness against global emissions as decisive against substantiality (Reasons [39](b); as to Reasons [39](a), § E.3.7 below).

54. That the applicants in *Pabai* ultimately failed on causation (at [1097]) does not assist Woodside; the reason they failed sharpens the distinction. Theirs was a negligence case, which by its nature isolated the marginal difference that more ambitious emissions targets would have made against Australia's existing emissions targets. Section 527E(1)(b) sets no counterfactual. It asks whether the action, through its emissions, is a substantial cause of the physical effects; and, as Part E.3.3 explains, it does not admit the plea that others would have emitted in the action's place.

55. Wigney J also accepted as "unassailable" the proposition that if every State set its course by asking whether its own emissions, taken in isolation, would be noticed against the global total, "the planet would effectively be doomed" (*Pabai* at [1093]–[1094]). That is the vice of the Minister's construction stated as principle: a reading of "substantial cause" under which no single emitting action can ever qualify, because each is small against the global aggregate, is a reading under which the provision can never operate on the class of harm to which it is most obviously directed (Part E.3.3). That conclusion is properly regarded as absurd, and, for that reason, is a conclusion about statutory meaning that this Court would be very slow to endorse.

56. The submissions above are not foreclosed by *ACF PJ* or *ACF FC* (cf MS [56.4]). Whether "substantial" means something more than "de minimis" was discussed but not decided in *ACF PJ*. There, the applicant for review "appeared to contend" that "substantial" carried such meaning, and relying upon remarks by Deane J in *Tillmanns Butcheries*. The contention was unnecessary to decide because the Minister reached no view about the "size" or "weight" of the impact; he rather concluded that he was unable to make "robust findings" about whether there would be an impact at all. Still, the primary judge went on to observe that he was unpersuaded that Deane J's observations in *Tillmanns Butcheries* (a case concerning the meaning of "substantial" in s 45D of the *Trade Practices Act 1974* (Cth)) were of assistance in construing the meaning of the word "substantial" in s 527E of the EPBC Act. So much is accepted here. No reliance is placed upon *Tillmanns Butcheries* in support of ACF's submissions in this case.

E.3.3. <u>The frame of reference</u>

57. The Minister measured the action's contribution against a single comparator: aggregate global emissions (Reasons [39](b); WS [179]–[181]). Against that comparator, every conceivable

action is "very small". Few nation-states, let alone single projects, account for even one per cent of global emissions; on the Minister's approach, Australia's entire national emissions would not be a "substantial cause" of the physical effects of climate change. Realistically, s 527E(1)(b) could never operate on any greenhouse-gas-emitting action at all. A construction under which the provision is incapable of application to the relevant class of case should not be attributed to Parliament.

58. That the action's contribution to global warming is "very small" only against the global aggregate of GHG emissions is borne out by the quantity of emissions that the Minister was assessing. On the assessment evidence, it was estimated that:

a. the action's direct (Scope 1) GHG emissions were up to 7.7 Mt CO_2-e per year—approximately 8.3% of Western Australia's, and approximately 1.4% of Australia's, total GHG emissions (on 2019 figures); and

b. the Scope 3 emissions from third-party combustion of the processed gas were approximately 80.19 Mt CO_2-e per year[1] and about 4 billion tonnes (some 4,009 Mt) over the 50-year operating life to 2070[2].

59. The annual combustion figure alone—about 80 Mt—is of the order of Western Australia's entire annual greenhouse gas emissions (91.85 Mt CO_2-e in 2019). Emissions on that scale are "very small" only when the comparator is worldwide emissions, as that comparator dwarfs the emissions of nation-states[3].

60. The statutory question fixes its own frame of reference: whether the action is a substantial cause of "that event or circumstance"— physical effects of climate change on the protected matters—through the causal mechanism the Minister accepted: that every tonne of CO_2 emissions adds to global warming, the harm deriving from cumulative atmospheric concentration (Reconsideration Reasons [160]; WS [126]). Within that mechanism, the relevant evaluation includes, necessarily, the absolute scale and duration of the contribution and the state of the system into which it is made (ACF [218]–[219]), not its proportion of a global denominator. For two things can be true at the same time. It can be true both that:

1 WA EPA Assessment Report (Report 1727) at 10–11; Approval Decision Brief, Attachment D1.

2 Proponent's Environmental Review Document, Table 6-15; Approval Decision Brief, Attachment E9.

3 Australia emissions accounting for only about 1.3% of global greenhouse gas emissions: Approval Decision Brief, Attachment E14.

a. the emission of some 4 billion tonnes of CO_2-e into the atmosphere is a "substantial cause" of physical effects of climate change on the protected matters (in that the action is a non-trivial contributor to the harmful phenomenon of global warming); and, yet

b. the emission of some 4 billion tonnes of CO_2-e into the atmosphere is but a small fraction of the overall amount of CO_2-e likely to be emitted into the atmosphere over the next 50 years.

61. The two propositions are not mutually exclusive; the second does not preclude the first.

62. This is not an appeal to the objects of the Act "at all costs" (cf WS [183]–[185], citing *Carr v Western Australia*). The Applicant's point is narrower and textual: as between two open constructions, one of which leaves s 527E(1)(b) with work to do and one of which guarantees its non-application to the most significant category of indirect environmental harm, the former is to be preferred (ACF [221]; *Port of Newcastle Operations v Glencore* (2021) 274 CLR 565 at [88]–[89]).

E.3.4. <u>ECCQ FC does not foreclose the construction point; it identifies it</u>

63. Woodside concedes that the construction point was "expressly left open" by *ECCQ FC* at [46] (WS [151]). Its fallback—that other observations in the joint judgment are "inconsistent with the availability" of the point (WS [152]–[154])—does not follow:

a. The "ill-suitedness" observations (*ECCQ FC* [140], [143]–[144]) describe the consequences of the construction the Minister adopted. They decide nothing about the constructional question, which the Court said was not before it.

b. The passage from *Verein KlimaSeniorinnen Schweiz v Switzerland* quoted at WS [152] is descriptive of the causal structure of climate harm—"[t]he harm derives from aggregate levels of such emissions"—which is the Applicant's point (ACF [218]–[219]), not an answer to it.

c. The rejection in ECCQ of the attacks on the Minister's reasoning (WS [137], [141]–[146]) was the rejection of rationality attacks advanced on an unchallenged construction. It says nothing about the present challenge, which is the very point the Full Court identified as not argued.

64. Nor is the construction point foreclosed by *ACF FC* (cf MS [56.4]).

E.3.5. Section 527E(2)

65. The complaint that ACF does not explain how its construction "coheres" with s 527E(2)(e)–(g) (WS [168]) seeks to sustain the decision on a basis that the Minister did not adopt. The Minister made conditional positive findings that the physical effects "could be" indirect consequences of the action (Reconsideration Reasons [160]–[161]; *ECCQ FC* [36], [38]) and rested his refusal solely on "substantial cause". In any event, s 527E(2) does its limiting work through the primary/secondary action structure and its requirements of foreseeability and contemplation. Combustion, by the purchasers of gas sold for combustion, is the paradigm of a foreseeable and contemplated secondary action. Nothing in s 527E(2) requires "substantial" in s 527E(1)(b) to mean numerically large.

E.3.6. International responsibilities

66. ACF maintains the submissions at ACF [222]–[223] as confirmatory of, not foundational to, the construction advanced. The construction stands on the text, context and purpose of the Act. ACF's construction is to be preferred on domestic principles alone, and so it may be unnecessary to resolve Woodside's contentions as to the temporal operation of the presumption of consistency (WS [190]). However, Woodside's submissions on this point should not be accepted.

67. Woodside's contentions as to the temporal operation of the presumption of consistency (WS [190]) are misplaced, particularly with respect to its reference that the ICJ relies on legal developments that post-date 2006.

68. As Woodside notes, the ICJ Advisory Opinion identifies and explains the content of *existing* obligations under international law with respect to climate change. This includes the duty to prevent significant harm to the environment, the existence of which was first identified in the 1941 *Trail Smelter (United States of America/Canada)* arbitration case,[4] and the precautionary principle which first received global recognition in international law under the 1992 Rio Declaration (a version of which is enshrined in s 391 of the EPBC Act).

69. The principles of international law which inform Australia's environmental responsibilities pursuant to s 3(e) of the EPBC Act arise from a range of sources, including treaties to which Australia is a party, customary international law and general principles of international law, many of which existed prior to 2006, and which have continued to develop since then. The stated object of assisting in *co-operative* implementation of Australia's international environmental

[4] ICJ Advisory Opinion, [272]ff.

responsibilities would be almost entirely frustrated by a temporally restricted interpretation of those responsibilities that does not reflect the evolving nature of international environmental law. A statute is to be construed, as far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law.[5]

E.3.7. Materiality: both limbs proceed from the one misconstruction

70. Woodside's final answer (WS [122], [192]–[194]) is that the Applicant "does not take issue with the reasoning in the first limb", which is said to stand as an independent and sufficient basis for the decision. The premise is wrong and the conclusion does not follow.

71. First, the premise misreads the Applicant's submissions. ACF [215(c)(i)] expressly identifies the first limb—whether emissions were "'small' enough to be cancelled out by other independent events (thus resulting in no net emissions)"—as one of the two arithmetical findings. ACF [216] submits that it was wrong to construe s 527E as though findings of either kind sufficed. Both limbs are, and always were, attacked as products of the one misconstruction.

72. Secondly, the limbs are not independent of the construction question. Both appear in the Minister's reasons as the two stated reasons for the single conclusion that "the proposed action is not a substantial cause of the stated physical effects" (Reasons [39]; Reconsideration Reasons [163]). The Full Court characterised the identical reasoning in exactly that way: "[t]his was her reasoning on both limbs" (*ECCQ FC* [76]). The independence recognised in *ECCQ FC* at [120] was the independence of the limbs from each other, as alternative paths of reasoning. It was not, and could not have been, a holding that either limb was independent of a construction of "substantial cause" that was not in issue.

73. Thirdly, the first limb embodies the same error. It asks whether the information "demonstrates" that the action "will cause any net increase in global GHG emissions and global average temperature"—that is, whether the action makes a global aggregate measurably larger once the hypothesised conduct of third parties ("multiple variables") is netted off. That is the same arithmetical, net-aggregate conception of causation in another form, and sits uneasily with the finding that the Minister had already accepted: that "every tonne of CO_2 emissions adds to global

5 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J), referring to *Grenada County Supervisors v Brogden* (1884) 112 US 261, 269; *Polites v The Commonwealth* (1945) 70 CLR 60, 68–69 (Latham CJ), 77 (Dixon J), 80-81 (Williams J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ); *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, [97] (Gummow and Hayne JJ).

warming" (Reasons at [183]). In any event, the Minister's fixation on whether the information demonstrates that the action will cause a "net increase" is misconceived. The issue was not whether the information demonstrated that the action might make the physical effects of climate change on MNES *worse*, it was whether the information demonstrated that the action would be *a cause* of the physical effects of climate change on MNES, and, if so, whether it is properly regarded as a "substantial" cause of those effects on MNES. In circumstances where the Minister accepted (1) that "climate change from anthropogenic sources of GHG emissions has and/or will have physical effects on protected matters" (Reasons at [36]), (2) that "every tonne of CO_2 emissions adds to global warming" (Reasons at [183]), and (3) that the action would be a source of GHG emissions (Reasons at [37]), the Minister necessarily accepted that the action would be a cause of climate change, and, by extension, a cause of the physical effects of climate change on MNES: This is precisely how the Full Court understood the Minister's reasons in *ECCQ FC*. Critically, the action would be "a cause" of those effects on MNES *even if* it made the harmful effects no worse than they currently are. Accordingly, having accepted that the action would be "a cause" of the physical effects of climate change on protected matters (even if it merely held current effects steady), the Minister was required to determine whether this cause was "substantial" in the requisite sense. That called for an evaluation of whether this action's contribution to the physical effects of climate change on protected matters was "of substance", ie real, and more than trivial, remote or fanciful. That evaluation was one that had nothing to do with whether *other actions* or "variables" might result in a *decrease* in global GHG emissions and global average temperature, such that this action would, in the scheme of things, produce no "net increase in global GHG emissions and global average temperature".

74. Fourthly, the observation that the first limb "survived attack" in *ECCQ PJ* and *ECCQ FC* (WS [192], referring to WS [137]) does not assist. The attacks that failed were rationality attacks advanced on an unchallenged construction (see Part E.3.4 above). They say nothing about whether the first limb survives the construction point that was not argued there and is argued here. Woodside points out that special leave to appeal was refused (WS [137]), but omits that special leave was refused because the case:

> would not be an appropriate vehicle to determine the issue of principle concerning the interpretation of s 527E(1)(b) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which was not decided by the Full Court. ([2024] HCASL 201 at [2])

75. Fifthly, as to the legal standard: materiality requires no more than a realistic possibility that the decision could have been different had the error not been made. Where both limbs were findings reached under a misdirection as to the statutory test, the Court cannot reconstruct the findings

the Minister would have made under the correct test. The realistic possibility of a different outcome follows.

F. GROUND 5 — APPREHENDED BIAS

76. Woodside advances three answers to Ground 5 (WS [199]):

    a. first, that no duty of procedural fairness was owed to ACF, so the rule against bias cannot be invoked;

    b. secondly, that the Applicant's case does not engage the tripartite test and is "really" an unpleaded allegation of actual bias; and

    c. thirdly, that the Applicant's narrative is distorted. Each should be rejected.

77. The Minister relies on Woodside's submissions on the second and third answers and does not embrace the first of those answers, submitting that it need not be decided (MS [63]).

F.1 The threshold point: the bias rule is not excluded

78. Woodside's argument runs: the bias rule is an aspect of procedural fairness; ACF was owed no procedural fairness (*Wilderness Society FC* at [88]); alternatively any duty was excluded by ss 131AA(7) and 131A (WS [215]–[221]). There are four answers.

79. First, s 131AA(7) is, on its face, confined: it is "an exhaustive statement of the requirements of the natural justice hearing rule". Parliament's words pick out the hearing rule alone. The rule against bias is the other, distinct rule of procedural fairness — a distinction drawn in the very authority Woodside cites (*CNY17* at [16]: WS fn 189). A provision exhaustively stating the hearing rule says nothing about the rule against bias, and an intention to exclude so fundamental a rule is not to be imputed from words directed to a different rule. Even where a statute controls the content of procedural fairness or natural justice more broadly, it is impliedly limited to affecting only the hearing rule, and Courts are unwilling to accept that general words or a purported codification of procedural requirements could exclude the rule against bias.[6] It barely

[6] *Re Minister for Immigration and Multicultural Affairs; ex parte Epeabaka* (2001) 206 CLR 128 at [28] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [54]-[58] (Kirby J); *Re Minister for Immigration and Multicultural Affairs; ex parte **Miah*** (2001) 206 CLR 57 at [43] (Gleeson CJ and Hayne J), [128], [131] (McHugh J), [181] (Kirby J).

need be stated that where a rule of natural justice applies, as it does here, compliance with it is essential to the valid exercise of a power.[7]

80. Secondly, *Wilderness Society FC* at [88] concerned the hearing rule: whether the Wilderness Society was entitled to be heard before the s 133 decision. The rule against bias stands differently. It attaches to the repository of the power and conditions the impartial exercise of the power itself; the question is not whether the challenger had a right to be heard, but whether the decision-maker was, in appearance, disqualified from deciding: see *Austin BMI Pty Ltd v Deputy Premier (No 1)* (2023) 16 QR 377 at [61]–[66], recognising the distinction. It is not the case that a decision affected by a disqualifying apprehension of bias is valid as against strangers and invalid only as against persons with hearing rights: it either answers the statutory description of a lawful exercise of the power or it does not. As Deane J recognised in *Haoucher*:[8] "the circumstances of a particular case may be such that procedural fairness does not require that each person affected be accorded an effective opportunity of being personally heard before a decision is made but nonetheless requires that the decision-maker be, and appear to be, personally unbiased". It is entirely orthodox that a person not owed a hearing—including where his or her right to a hearing has been abrogated by statute—can still challenge a decision on the basis of apprehended bias.[9] ACF, whose standing is conceded (WS [3]), is in that position.

81. Thirdly, standing in judicial review proceedings is to be assessed by reference to the plaintiff's interest in the relief sought and the subject matter of the litigation, and not by reference to the specific grounds of review.[10] A plaintiff with standing to challenge a decision is "entitled to advance all grounds which may be available to do so",[11] even those "grounds (which may be good grounds) in which he has no personal interest".[12] In so far as the legislation in this case limits who is owed a hearing, as this Court has observed, "in none of the High Court cases is there any suggestion that the concern that amounts to a special interest must be the same concern as that which motivated the legislature in enacting the legislation out of which the action

7 *Kioa v West* (1985) 159 CLR 550 at 629 (Brennan J); *Miah* (2002) 206 CLR 57 at [29]-[30] (Gleeson CJ and Hayne J), [49]-[55] (Gaudron J), [128]-[129] (McHugh J), [189]-[192] (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [25] (Gleeson CJ).

8 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652-653 (Deane J).

9 By way of example, including in recent cases where the *Migration Act 1958* (Cth) provided that "[t]he rules of natural justice do not apply": *Jama v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1419 (Button J); *HSKJ v Minister for Immigration and Multicultural Affairs* [2025] FCA 165 (O'Sullivan J).

10 *R (**Kides**) v South Cambridgeshire District Council Ltd* [2003] 1 P & CR 19, [132]-[134] (Parker LJ, Aldous and Laws JJ agreeing); ***Coast Ward** Ratepayers Association (Inc) v Town of Cambridge* [2016] WASC 239 at [91] (Pritchard J); Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2022) at [14.10].

11 *Coast Ward* [2016] WASC 239 at [91] (Pritchard J).

12 *Kides* [2003] 1 P & CR 19, [132]-[134] (Parker LJ, Aldous and Laws JJ agreeing).

arose".[13] Justice Wilcox noted, in that regard, that in *Shop Distributive and Allied Employees Association*,[14] the High Court held that was unnecessary to decide whether the legislation was enacted for a purpose of limiting shop assistants' working hours (which coincided with the union's interest) or for a purpose of Sabbath Day observance (which probably did not), because "it was enough that members of the appellant organisation had an interest in the *validity of the certificates* that transcended that of the public generally".[15] Similarly, whatever ACF's role with respect to the decision-making *process*, it has an interest in the validity of the Approval Decision beyond that of the public generally.

82. Fourthly, the consequences of Woodside's construction condemn it. If the only person who can challenge a decision on the basis of bias is the person owed a hearing in respect of a s 133 approval, then an approval vitiated by the grossest partiality (actual or apparent) towards the proponent could never be challenged by anyone: the only person entitled to complain would be the beneficiary of the partiality. Similarly, gross partiality towards a decision-maker's *personal* interest, which happens also to benefit a proponent, would be practically immune from challenge. Parliament should not be taken to have created an approval power immune from the oldest rule of impartial public decision-making, in an Act that confers extended standing on persons in the Applicant's position to enable such persons to speak on behalf of the environment (s 487).[16]

83. It was a condition of the lawful exercise of the power to make the Approval Decision that the Minister be unbiased, both actually and apparently. ACF, as a person with standing to police the lawfulness of the Approval Decision, is entitled to allege that the Approval Decision was unlawful by reason of apprehended bias.

F.2 The "actual bias in disguise" argument mischaracterises the ground

84. WS [223]–[230] contend that ACF's case is an allegation of actual bias by inference. It is not, and has never been put that way (ACF [225]–[227]). To remove any doubt, the tripartite analysis is:

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13 ***Allan*** *v Development Allowance Authority* (1998) 80 FCR 583 (Wilcox J, RD Nicholson and Kidd JJ agreeing).

14 *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs of State Australia* (1995) 183 CLR 552.

15 *Allan* (1998) 80 FCR 583 (Wilcox J, RD Nicholson and Kidd JJ agreeing) (emphasis added).

16 *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)* [2024] FCAFC 97; 425 ALR 224 [55] (Mortimer CJ).

a. *Factor*: the demonstrated commitment of the decision-making apparatus to delivering a timely approval of the NWS Project Extension on terms acceptable to Woodside — manifested in the subordination of the Reconsideration Decision, the Reconsideration Reasons and the statutory timeframes to the approval timetable, and in the character of the conditions negotiation, in which Woodside functioned as co-author and de facto approver of the decision instrument.

b. *Connection*: a Minister (with his Department) so committed might not bring an impartial mind to whether the action should be approved at all, and to whether the conditions were those "necessary or convenient" for the protection of the National Heritage place (s 134(1)), as distinct from those acceptable to the proponent.

c. *Reasonableness*: assessed on the whole of the evidence (ACF [232]–[254]) through the eyes of a fair-minded lay observer credited with knowledge of the statutory scheme, the Minister's political role, and ordinary departmental practice (ACF [228]–[230]).

85. Woodside's complaint that ACF proceeds by "inference from facts" (WS [227]) misunderstands the exercise. In conduct cases—conduct being one of the recognised categories (*Webb* at 74)—the factor is necessarily established by inference from the conduct. The standard remains the "double might" test: possibility, not probability. It is Woodside's invocation of actual-bias standards of proof (WS [227]) that inverts the test the High Court has laid down (*Ebner* at [8]; *QYFM* at [38]; *SunshineLoans* at [1], [60]).

F.3 Sequencing: the explanation confirms rather than dispels the apprehension

86. Much of WS [232]–[239]—the WA assessment and appeals process, the ECCQ litigation, the caretaker convention—explains the period to early 2025, and may be accepted for present purposes. The apprehension arises from what that narrative does not explain:

a. ACF's request for advance notice of an intended approval (22 May 2025) went unanswered and its request for reasons (28 May 2025)—reasons then "substantially progressed"—was met only on 29 September 2025, two weeks after the Approval Decision and months out of statutory time, despite two follow-ups (ACF [237]–[245]);

b. the Approval Reasons reproduce key passages of the Reconsideration Reasons verbatim (ACF [240])—the reasons existed in substance well before they were provided to the only parties in a position to test them.

87. The workload explanation (174 briefs: WS [240]) and the asserted absence of any "consistent practice" of timely reasons may explain delay in the abstract. They do not explain why every discretionary choice in the sequence — prioritisation, briefing, the timing of reasons — fell in favour of the approval and against the interests of its opponents. The fair-minded observer takes the overall impression of the whole of the material (*Barngarla* at [177]).

F.4 The consultation: beyond what the Act contemplates

88. It is accepted that ss 131AA, 134(4)(aa) and 134(3A) contemplate consultation with the proponent on conditions, that such consultation may be intensive for a large project, and that informality of communication is not of itself indicative of an apprehension of bias (WS [245]–[249]). The Applicant's case does not rest on the fact of consultation but on its character and direction (ACF [251]):

a. successive "final" Decision Notices were supplied to the proponent, returned with mark-ups, and revised accordingly—on one occasion on a "quick turnaround" promised in advance by a Deputy Secretary (ACF [269]–[284]);

b. the negotiation was conducted, in its final phase, through the proponent's own instrument: a table in which Woodside marked conditions "Condition must be revised", to which the Department added a responsive column proposing the revision of each (ACF [279]–[281]);

c. the Department offered Woodside "visibility" of, and alignment with, its public "messaging" (ACF [257]–[258]);

d. mid-negotiation, a Deputy Secretary opened a channel with the proponent's government-relations Vice President on "environmental law reform"—"Let's wait till current matter is cleared and then we'll move onto the next thing!" (ACF [261]);

e. the closing exchange—"3 items … which if modified would then constitute a document we can accept"; "Thanks Rachel! We got there!" (ACF [287], [291]).

89. None of that is required or contemplated by s 131AA, which provides for an invitation to comment and for the comments to be taken into account. *Wilderness Society PJ* at [147], on which Woodside relies (WS [214], [246]), described a departmental practice of assisting proponents with referrals; but it does not describe, and no authority sanctions, the pre-approval of the decision instrument by its beneficiary.

90. Woodside’s comparator—that the final conditions were more onerous than the MS 1233 alignment Woodside first sought (WS [8], [274])—is the wrong baseline. The relevant movement is from the Minister’s own proposed conditions, inferentially considered by him necessary or convenient (s 134(1)), to the final set: the material changes moved in one direction, toward Woodside’s position, and the Reasons do not explain why conditions previously judged necessary ceased to be so, otherwise than by reference to “feasibility” and “implementability” as asserted by the proponent—in the face of ECASS advice that NOx reductions of 90–95%, and up to 98%, were achievable with current technology (ACF [263]–[264]).

91. As to attribution (WS [231]), unlike *Hot Holdings*, where the officer affected by an interest was peripheral to the decision, here the Minister’s office was briefed on the negotiation and the proponent’s mark-ups throughout, and the Minister endorsed its product (ACF [253], [266], [268], [289]). The conduct relied upon is that of the decision-making apparatus, not of a stray adviser whose involvement the Minister knew nothing of.

92. Finally, the ministerial latitude principle (*Jia* at [63]; *Hot Holdings* at [70]; *McGovern* at [80]) is accepted and was anticipated (ACF [228]–[229]). A Minister may hold and pursue a policy preference, and may say so publicly. What the latitude does not embrace is an apprehension that the statutory tasks—the s 78C reconsideration and the s 134(1) conditions judgment—might be performed to a predetermined end, on terms settled with the beneficiary of the decision. That is the line between political preference and prejudgment drawn at ACF [229]; it is the latter that the evidence, taken as a whole, raises.

Dated: 7 July 2026

A SCOTT KC | **J UNDERWOOD** | **H DOUGLAS**