JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	CONSERVATION COUNCIL OF WA INC -v- CHAIRMAN, ENVIRONMENTAL PROTECTION AUTHORITY [2022] WASC 58
CORAM	**:**	ALLANSON J
HEARD	**:**	20 - 21 DECEMBER 2021
DELIVERED	**:**	1 MARCH 2022
FILE NO/S	**:**	CIV 2247 of 2020
BETWEEN	**:**	CONSERVATION COUNCIL OF WA INC Applicant AND CHAIRMAN, ENVIRONMENTAL PROTECTION AUTHORITY Respondent WOODSIDE ENERGY LTD Other Party THE STATE OF WESTERN AUSTRALIA Intervenor

Catchwords:

Judicial review - *Environmental Protection Act 1986* (WA) - Where proponent of proposal applied to respondent to approve changes during implementation pursuant to s 45C of the Act - Where application assessed by offices of Department who provided memorandum recommending approval and a letter

notifying the proponent of the decision - Where respondent signed the memorandum accepting the recommendation and signed the letter - Whether the respondent had personally carried out the duty to consider whether the proposed changes might have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal - Turns on facts

Judicial review - Where respondent required to consider whether changes to proposal might have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal - Whether respondent correctly understood and applied s 45C or considered whether a detrimental effect was 'unlikely'

Judicial review - Where respondent required to consider whether changes to proposal might have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal - Whether respondent apply the correct standard by failing to evaluate the detrimental environmental effects of the original proposal as it had been implemented in fact - Turns on own facts

Judicial review - Where respondent required to consider whether changes to proposal might have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal - Whether respondent required to assess possible environmental effect of the proposed change against the same criteria as the original proposal

Judicial review - Where applicant commenced proceedings over 17 months after it became aware of reviewable decision - Where applicant requires leave to proceed outside the limitation period under O 56 of the *Rules of the Supreme Court 1971* (WA) - Whether sufficient justification for delay

Judicial review - Where applicant requires leave to proceed outside the limitation period - Whether other party would suffer prejudice if applicant given leave to proceed

Legislation:

Environmental Protection Act 1986 (WA)
Rules of the Supreme Court 1971 (WA)

Result:

Application for leave to proceed dismissed

Application for review dismissed

Category: B

Representation:

Counsel:

Applicant	:	Mr H H Jackson SC and Mr C M Beetham
Respondent	:	No appearance
Other Party	:	Mr S Penglis SC and Ms M Georgiou
Intervenor	:	Mr A J Sefton SC and Ms J E Shaw

Solicitors:

Applicant	:	Environmental Defender's Office Of Western Australia
Respondent	:	State Solicitor's Office
Other Party	:	Allens
Intervenor	:	State Solicitor's Office

Case(s) referred to in decision(s):

Asiamet (No 1) Resources Pty Ltd v Commissioner of Taxation (Cth) (2003) 126 FCR 304
Australian Securities and Investments Commission v Hellicar (2012) 247 CLR 345
Blatch v Archer (1774) 1 Cowp 63; 98 ER 969
Carrascalao v Minister for Immigration and Border Protection [2017] FCAFC 107
Chetcuti v Minister for Immigration and Border Protection [2019] FCAFC 112; (2019) 270 FCR 335
Gallow v The Honourable Justice Dawson [1990] HCA 30; (1990) 64 ALJR 458
Girlock (Sales) Pty Ltd v Hurrell (1982) 149 CLR 155
Hall v City of Burnside [2006] SASC 283
Henderson v Queensland (2014) 255 CLR 1
Hossain v Minister for Immigration and Border Protection[2018] HCA 34; (2018) 264 CLR 123
Hunter Valley Developments Pty Ltd v Cohen [1984] FCA 176; (1984) 3 FCR 344
Jacob v Save Beeliar Wetlands (Inc) [2016] WASCA 126; (2016) 50 WAR 313
Jones v Dunkel (1958) 101 CLR 298

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24

Minister for Immigration and Border Protection v SZMTA [2019] HCA 3; (2019) 264 CLR 421

Minister for Immigration and Border Protection v WZARH [2015] HCA 40; (2015) 256 CLR 326

Minister for Immigration and Citizenship v SZGUR (2011) HCA 1; (2011) 241 CLR 594

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17

Pennock v City of Busselton [2021] WASC 29

Plaintiff M47/2018 v Minister for Home Affairs [2019] HCA 17; (2019) 265 CLR 285

Polaris Coomera Pty Ltd v Minister for the Environment [2021] FCA 254

Public Service Board (NSW) v Osmond [1986] HCA 7; (1986) 159 CLR 656

R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13

Re City of Perth; Ex parte Lord [2002] WASCA 254

Re Commonwealth of Australia; Ex parte Marks [2000] HCA 67; (2000) 75 ALJR 470

Re Minister for the Environment; Ex parte Elwood [2007] WASCA 137

Seafish Tasmania Pelagic Pty Ltd Ltd v Minister for Sustainability, Environment, Water, Pollution and Communities (No 2) [2014] FCA 117; (2014) 225 FCR 97

Trustees of the Property of Cummins (A Bankrupt) v Cummins (2006) 227 CLR 278

Vella v Minister for Immigration and Border Protection [2015] HCA 42; 326 ALR 391

Wingfoot Australia Partners Pty Ltd v Kocak [2013] HCA 43

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ALLANSON J:

Introduction

1 On 1 July 2019, the Chairman of the Environmental Protection Authority approved an application by Woodside Energy Ltd for changes to the Pluto Liquefied Natural Gas (LNG) Project proposal (Ministerial Statement 757), pursuant to s 45C(1) of the *Environmental Protection Act 1986* (WA).

2 The applicant, the Conservation Council of Western Australia Inc, became aware of the decision on 2 July 2019.[1]

3 On 18 December 2020, the applicant commenced these proceedings to review the decision.

4 The Chairman, Environmental Protection Authority, was named as the respondent. At the time of the decision, Dr Tom Hatton held the office of Chairman. Dr Hatton's term has now expired.

5 The respondent gave notice that he would abide the decision of the court. The State of Western Australia intervened.

6 Woodside Energy Ltd appeared as 'other party' to the application.

7 Woodside applied under s 45C for three separate changes:

(a) deleting the described gas field from the proposal preamble, and introduction to sch 1 of the approval;

(b) deleting the described gas turbine types used to drive the liquefaction compressors and for power generation; and

(c) including gas export via shipping, trucking or piping in sch 1.

8 This judicial review application focused on the first of the changes and, in particular, whether it might have a significant detrimental effect on the environment, additional to that resulting from the original proposal, from increased greenhouse gas emissions.

9 The application for review was made outside the time limited by O 56 of the *Rules of the Supreme Court 1971* (WA). The applicant applied for leave to proceed with the application. The application for leave was opposed, but all parties agreed that the question of leave

[1] Agreed facts [24].

should be dealt with at the hearing of the main application. Woodside filed substantial affidavit evidence directed to the prejudice it said it and third parties would suffer were the application upheld after such a protracted delay.

10 In these reasons, unless stated otherwise, references to legislation are to the *Environmental Protection Act 1986* as it was in July 2019.[2]

11 I will generally use the defined terms adopted by the parties in their statement of agreed facts. I expand some acronyms where I think that makes the reasons easier to read. Others, such as EPA (Environmental Protection Authority), are sufficiently familiar to be left.

Evidence

12 The applicant read the affidavit of Timothy James Macknay, Managing Lawyer of the Environmental Defenders Office Ltd, affirmed 8 March 2021; and the affidavit of Ruby Luciana Hamilton, solicitor, affirmed 19 October 2021.

13 The respondent did not adduce evidence.

14 The State read the affidavit of Anthony Xavier Sutton, Executive Director of the EPA Services Directorate of the Department of Water and Environmental Regulation, affirmed 31 May 2021. The only direct evidence regarding the decision-making process in this case was in the affidavit of Mr Sutton. The parties filed a statement of agreed facts that included most of Mr Sutton's evidence regarding the events leading to the decision of the respondent. Mr Sutton also included, as attachments, relevant documents including the draft application, the memorandum to the respondent, and the respondent's letter advising Woodside of the decision.

15 Woodside read 17 affidavits, eight of which were received as confidential evidence due to the commercially sensitive nature of the information in them. Submissions on prejudice, in response to the application for an extension of time, were heard in closed court for the same reason. The affidavits filed were made by:

[2] The Act was substantially amended by the *Environmental Protection Amendment Act 2020*. Relevantly, s 45, s 45A, s 45B and s 45C were deleted and replaced.

(1) Charles Philip Blaxill:

(a) Affidavit affirmed 29 September 2021.

(b) Confidential affidavit affirmed 1 October 2021.

(c) Second Affidavit affirmed 16 November 2021.

(d) Third Affidavit affirmed 3 December 2021.

(2) Michael Kenneth Gibson:

(a) Affidavit affirmed 8 September 2021.

(b) Second Affidavit affirmed 8 November 2021.

(3) Gareth Ewart Holmes:

(a) Confidential affidavit affirmed 1 October 2021.

(b) Second Confidential Affidavit affirmed 12 November 2021.

(c) Third Confidential Affidavit affirmed 6 December 2021.

(4) Linda Evelyn Lim:

(a) Affidavit affirmed 8 September 2021.

(b) Second Affidavit affirmed 8 November 2021.

(5) Gary William McLeod:

(a) Affidavit affirmed 8 September 2021.

(b) Confidential affidavit affirmed 5 October 2021.

(c) Second Confidential Affidavit affirmed 8 November 2021.

(d) Second Affidavit affirmed 8 November 2021.

(6) Mark Peter Palermo:

(a) Confidential affidavit affirmed 5 October 2021.

(b) Second Confidential Affidavit affirmed 13 December 2021.

16 The court also received, as an exhibit, a letter dated 24 January 2020 from Niall Myles of Woodside Energy to the applicant.

Fact finding

17 The determination of the issues in this application is based largely on findings of fact. For that reason, I will make some preliminary comments on fact finding in judicial review applications.

18 The general position at common law is that the person asserting a fact bears the onus of proof. Subject to any modifying statutory provision, that position applies in judicial review proceedings.[3] The applicant bears the onus of proof in establishing the facts necessary to make out the errors it alleged.[4] It is not for the parties seeking to affirm the decision to demonstrate, by way of evidence or inference, that the decision was regularly reached.[5]

19 The primary facts were not contested. None of the deponents of affidavits was cross-examined. The applicant's case turned on inferences to be drawn from the admitted facts, the material before the respondent, the letter the respondent sent to Woodside Energy advising it of his decision, and the evidence of Mr Sutton about events leading to the making of the decision.

20 Where the applicant relies on inferences from the agreed or proved facts, those facts 'must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied'.[6] The State and Woodside have each raised the issue of materiality: whether there was a possibility of a different outcome; whether the error was inconsequential so that it could not have materially affected the decision that was made.[7] The existence of a realistic possibility that the decision could have been different is a question of fact in respect of which the applicant bears the onus of proof.[8] Even though speaking of a possibility, we are concerned with past events. Considering materiality 'does not take place in a universe

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[3] ***Plaintiff M47/2018 v Minister for Home Affairs*** [2019] HCA 17; (2019) 265 CLR 285 [39]; ***Minister for Immigration and Citizenship v SZGUR*** (2011) HCA 1; (2011) 241 CLR 594 [67].
[4] ***Plaintiff M47/2018 v Minister for Home Affairs*** [2019] HCA 17; (2019) 265 CLR 285 [39]; ***Minister for Immigration and Citizenship v SZGUR*** (2011) HCA 1; (2011) 241 CLR 594 [67].
[5] See ***Minister for Immigration and Citizenship v SZGUR*** [67] - [68].
[6] ***Jones v Dunkel*** (1958) 101 CLR 298, 305.
[7] ***Minister for Immigration and Border Protection v WZARH*** [2015] HCA 40; (2015) 256 CLR 326, 341 [56], ***Hossain v Minister for Immigration and Border Protection*** [2018] HCA 34; (2018) 264 CLR 123 [30], [31].
[8] ***Minister for Immigration and Border Protection v SZMTA*** [2019] HCA 3; (2019) 264 CLR 421 [45] - [46].

of hypothetical facts'; the process of determining whether an error was material is assessed against the existing facts before the decision maker.[9]

The statutory context

21 The grounds of the application for review each assert that the decision of the respondent was beyond power. The applicant contends that the respondent exceeded the limits of the decision-making authority conferred on the Minister (and the respondent as delegate) to approve Woodside changing its proposal, during implementation, without a revised proposal being referred to the EPA under pt IV of the Act.

22 The limits of the decision-making authority conferred by the Act are determined as an exercise in statutory interpretation.

> Non-compliance with an express or implied statutory condition of a conferral of statutory decision-making authority can, but need not, result in a decision that exceeds the limits of the decision-making authority conferred by statute. Whether, and if so in what circumstances, non-compliance results in a decision that exceeds the limits of the decision-making authority conferred by the statute is itself a question of statutory interpretation.[10]

23 The principles of statutory construction require that the court start with a consideration of the text of the Act, in its context.

24 Section 4A sets out a statement of objects and principles of the Act. The object of the Act is to protect the environment of the State, having regard to five principles: the precautionary principle; the principle of intergenerational equity; the principle of the conservation of biological diversity and ecological integrity; principles in relation to improved valuation, pricing and incentive mechanisms; and the principle of waste minimisation.

25 Proposal is defined in s 3(1):

> ***proposal*** means a project, plan, programme, policy, operation, undertaking or development or change in land use, or amendment of any of the foregoing, but does not include scheme.

26 The ***proponent***, in relation to a proposal, is also defined in s 3(1) and means 'the person who or which is responsible for the proposal, or

[9] ***Hossain v Minister for Immigration and Border Protection*** [78].
[10] ***MZAPC v Minister for Immigration and Border Protection*** [2021] HCA 17 [30].

the public authority on which the responsibility for the proposal is imposed under another written law'.

27 Part IV deals with environmental impact assessment. Part IV div 1 provides for referral and assessment of proposals, including a 'significant proposal', defined as a proposal likely, if implemented, to have a significant effect on the environment.[11]

28 Section 38 provides for the referral of proposals to the EPA. Subject to s 38(2) and s 38(5), any person may refer a proposal to the EPA. Relevantly, a decision making authority[12] with notice of a proposal that appears to be a significant proposal is required to refer the proposal.

29 When a proposal is referred to it under s 38, the EPA must decide whether or not to assess the proposal.[13] Section 40 provides for assessing referred proposals. The EPA has a range of powers available to it for the purposes of assessing a proposal, including to require any person to provide information, to require the proponent to undertake an environmental review, or to conduct a public inquiry.

30 A decision making authority that has referred a proposal shall not make any decision that could have the effect of causing or allowing the proposal to be implemented, other than to allow the doing of minor or preliminary work to which the EPA has assented, until it is informed that the EPA is not going to assess the proposal, or an authority is served on it under s 45(7).[14]

31 Where the decision to assess a proposal has been set out by the EPA in the public record kept under s 39, it is an offence for a person to do anything to implement the proposal before a statement is published under s 45(5)(b) or notification is given under s 45(8).[15]

32 Section 42 provides for the conduct of public inquiries.

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[11] Section 37B(1). The adjective 'significant' is frequently used in the Act: for example, definition of 'serious environmental harm' includes harm that 'is significant or in an area of high conservation value or special significance'. Serious environmental harm is distinguished from 'material environmental harm' which is harm that is 'neither trivial nor negligible'.

[12] Defined, in effect, as a public authority empowered to make a decision in respect of any proposal.

[13] Section 39A.

[14] Section 41.

[15] Section 41A.

33 If the EPA assesses a proposal it is to prepare an assessment report and give it to the Minister.[16] By s 44(2):

> (2) The assessment report must set out -
>
> (a) what the Authority considers to be the key environmental factors identified in the course of the assessment; and
>
> (b) the Authority's recommendations as to whether or not the proposal may be implemented and, if it recommends that implementation be allowed, as to the conditions and procedures, if any, to which implementation should be subject.

34 The Minister shall cause an assessment report to be published, and copies to be given to any other Minister likely to be concerned in the outcome of the proposal, specified decision making authorities, and the proponent or other person who referred the proposal.[17]

35 Part IV div 2 deals with implementation of proposals including, in s 45, the procedure for deciding if a proposal may be implemented, including a procedure for resolution of any disagreement between relevant decision making authorities, and rights of appeal.

36 By s 45(5):

> If the implementation agreement or decision is that the proposal may be implemented, or may be implemented subject to implementation conditions, the Minister is to -
>
> (a) cause copies of a statement setting out the implementation agreement or decision to be served on -
>
> (i) the Authority; and
>
> (ii) each decision-making authority that was consulted under subsection (1); and
>
> (iii) the proponent of the proposal; and
>
> (iv) the person who referred the proposal (if it was not referred by a person referred to in subparagraph (ii) or (iii));
>
> and

[16] Section 44(1).
[17] Section 44.

> (b) cause the statement to be published as soon as is practicable after it is served under paragraph (a).

37 Section 45(7) provides:

> The Minister may, as soon as he is satisfied that there is no reason why a proposal in respect of which a statement has been published under subsection (5)(b) should not be implemented, cause to be served on the decision-making authority precluded by section 41 from making any decision that could have the effect of causing or allowing that proposal to be implemented an authority in writing permitting such a decision to be made.

38 The Act operates in relation to a proposal until it has been fully implemented.[18]

39 Section 45C provides for changes to a proposal after the s 45(5) statement is issued - that is, after an implementation decision or agreement; s 46 provides for changes to implementation conditions, and s 46B and s 46C provide for amendment of implementation conditions.

40 Section 45C has two parts. Section 45C(1) empowers the Minister to approve a change to a proposal without the revised proposal being referred to the EPA under pt IV for assessment. Subsection (2) conditions that power:

> (2) The Minister must not give approval under subsection (1) if the Minister considers the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal.

41 By s 47:

> (1) If a statement has been served under section 45(5) and the proponent does not ensure that any implementation of the proposal to which the statement relates is carried out in accordance with the implementation conditions, the proponent commits an offence.
>
> (2) If a statement has been served under section 45(5)(a), the proponent is to give the CEO such reports and information about -
>
> (a) the implementation of the proposal to which the statement relates; and
>
> (b) compliance with the implementation conditions,

[18] ***Re Minister for the Environment; Ex parte Elwood*** [2007] WASCA 137 [100].

> as are required by written notice given to the proponent by the CEO.

42 Under s 48, the CEO[19] may monitor the implementation of a proposal for the purpose of determining whether conditions are being complied with; the section also sets out the powers that may be exercised in respect of any non-compliance.

43 Part V creates various offences related to causing pollution[20] or allowing pollution to be caused, and causing serious environmental harm, or material environmental harm, or allowing such environmental harm to be caused.

44 By s 74A, it is a defence to proceedings for certain offences under pt V for the person charged to prove that the pollution, emission, environmental harm, discharge or abandonment occurred in the implementation of a proposal in accordance with an implementation agreement or decision - relevantly, a decision under s 45(5) that a proposal may be implemented subject to implementation conditions.

45 The construction and operation of s 45C was considered by the Court of Appeal in ***Re Minister for the Environment; Ex parte Elwood*** (***Elwood***).[21] The applicant particularly relies on what was said in the reasons of Buss JA. The decision is also significant because the Administrative Procedures put in place by the EPA for the assessment of an application under s 45C, and the decision documents prepared in EPA Services, follow the guidance provided by those reasons. In particular, his Honour said:

> (1) the obligation to evaluate whether the relevant change or changes might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal is a jurisdictional fact or condition to the exercise of the power in s 45C(1);[22]
>
> (2) the word 'might' connotes that there is a reasonable possibility that the relevant change or changes will have the specified effect;[23]

[19] Defined as the chief executive officer of the Department through which the Act is administered.
[20] Defined in s 3A.
[21] ***Elwood***.
[22] ***Elwood*** [113].
[23] ***Elwood*** [113].

(3) the comparison which s 45C(2) contemplates is between the effect on the environment which the original proposal as it has been implemented in fact has had or will have and the effect on the environment which the relevant change or changes might have.[24]

46 His Honour identified six aspects to the evaluation required by s 45C(2):

> First, it is necessary to identify the content of the original proposal. Secondly, it is necessary to identify the content of the relevant change or changes and to determine whether it or they involve a revision of the original proposal. Thirdly, the Minister should decide whether the original proposal has had or will have any (and, if so, what) detrimental effect on the environment. At least where the implementation conditions do not irreconcilably conflict with the content of the original proposal, the Minister should take into account the implementation conditions in making that decision … Fourthly, the Minister should decide whether the change or changes to the original proposal 'might' (in the sense I have explained) have any (and, if so, what) detrimental effect on the environment. Fifthly, the Minister should decide whether the detrimental effect (if any) which the change or changes in question might have on the environment is additional to, or different from, the detrimental effect (if any) which the original proposal has had or will have. Sixthly, the Minister should decide whether any detrimental effect which the change or changes to the original proposal might have on the environment, and which is additional to, or different from, any detrimental effect which the original proposal has had or will have, is, in the circumstances, significant.[25]

The facts

47 The parties filed two statements of agreed facts - one addressed to the facts generally and one to the issue of prejudice to Woodside Energy. I set out parts of those statements where relevant in the following reasons. The facts otherwise are taken from the affidavit of Mr Sutton, and the documents attached to the affidavits of Mr Sutton and Mr Macknay.

The Pluto LNG Proposal and Ministerial Statement 757

48 The following facts were agreed:

> 1. On or about 11 April 2006, the Other Party referred the Pluto LNG Proposal (Pluto Proposal) to the Environmental Protection

[24] ***Elwood*** [117].
[25] ***Elwood*** [115].

> Authority (EPA) pursuant to s 38(1) of the *Environmental Protection Act*.
>
> 2. The Other Party is the proponent of the Pluto Proposal.
>
> 3. The EPA required the Other Party to assess the Pluto Proposal by way of a Public Environmental Review (Pluto PER), which was submitted by the Other Party to the EPA in December 2006.
>
> 4. The EPA assessed the Pluto Proposal and published a report containing its findings and recommendations in July 2007 (2007 Report). On 24 December 2007, the then Minister for the Environment (Minister) issued Ministerial Statement 757 (MS 757) authorising the implementation of the Pluto Proposal.
>
> 5. Prior to the amendment the subject of these proceedings, the Pluto Proposal had been amended three times, on 6 May 2008, 20 August 2009, and 29 March 2010, and its implementation conditions have been amended twice, on 19 and 24 January 2011.

49 The Pluto Proposal, as implemented, may be described by reference to several aspects of the definition of a proposal: a project, operation, undertaking and development which involved changes in land use. The content of the Pluto Proposal is summarised in the documents before the court, including the EPA Report, Bulletin 1259:

> Woodside Energy Ltd … has proposed to develop the Pluto gas field located offshore on the North West Shelf, approximately 190 kilometres north-west of Dampier. This proposal is for the construction and operation of facilities within Western Australian State territorial waters and on the Burrup Peninsula which would allow the gas field to be exploited.
>
> The gas would be transported by a sub-sea trunkline to the west coast of the Burrup Peninsula where the gas processing plant would be located on two designated Industrial Lease areas. The storage and export facility would be constructed on Site A and the gas processing plant would be constructed on Site B …
>
> LNG is produced by cooling the natural gas below -161 degrees Celsius so that it becomes a liquid. The liquid is one six hundredth of the gas volume and can thus be stored and transported to overseas markets. The production of LNG and condensate involves the following processes:
>
> - gas receival and inlet separation;
>
> - acid gas removal;

- gas dehydration;
- mercury removal;
- liquefaction;
- end flash and nitrogen removal;
- fractionation/heavies removal;
- refrigerant storage; and
- condensate stabilisation and export.

> Gas turbines (GTs) are used for compressing the gas and for the plants power requirements.
>
> Extensive dredging would also be needed for shipping tanker access to the export facility and gas trunkline installation. The gas trunkline, shipping channel and turning basin would require dredging over a two year period.[26]

50 Thus, the proposal had components of construction, including dredging and site works, a gas trunkline, a storage facility, LNG plant for the production of LNG and condensate, and an export jetty.

51 The Pluto Public Environmental Review described the development as 'up to two onshore processing trains each with a maximum production capacity of up to 5.9 million tonnes per annum (Mtpa) of Liquefied Natural Gas (LNG), or a total capacity of approximately 12 Mtpa'.[27]

52 The Pluto gas field and associated facilities were anticipated to have a 'design life' of up to 30 years.[28]

53 The Public Environmental Review noted the potential for development of other offshore reserves, describing the Pluto LNG as 'a potential tie in point for any regional gas discoveries',[29] and noted the potential of a 'Burrup LNG Park' as a potential aggregator for otherwise stranded or yet to be discovered gas fields in the region'.[30] The gas processing plant would be designed to accommodate flexibility in the

[26] Annexure AXS-4 to Affidavit of Anthony Xavier Sutton affirmed 31 May 2021, 172.
[27] Annexure AXS-3 to Affidavit of Anthony Xavier Sutton affirmed 31 May 2021, 172, 42, 90, 112.
[28] AXS-3, 90, 91, 112, 125.
[29] AXS-3, 46.
[30] AXS-3, 84.

supply of feed gains, allowing the facilities to potentially use gas from other fields.[31]

54 MS 757 provided for the implementation of the Pluto Liquefied Natural Gas Development (Site B Option) proposal, described as:

> The construction of facilities for the development of the Pluto Gas Field on the North-West Shelf, and the processing and export of the gas at a liquefied natural gas plant to be constructed on the Burrup Peninsula.[32]

55 The proposal was authorised to be implemented subject to the conditions set out in the statement, including conditions relating to compliance reporting, air emissions, greenhouse gas abatement, offsets, and decommissioning.

56 Schedule 1 of MS 757 commences with a description of the proposal, in the terms set out above, but including:

> The gas is to be transported by a sub-sea trunk line to the West Coast of the Burrup Peninsular where the LNG plant will be sited on two of the designed Industrial Lease Areas. The storage and export facility is to be constructed on Site A and the gas processing plant is to be constructed on Site B.
>
> Extensive dredging will be undertaken to allow tanker access to the export facility and for gas-trunk line installation.
>
> The proposal is described in the document *Pluto LNG Development - Draft Public Environment Report/Public Environment Review* prepared by Woodside energy Ltd (2006).[33]

57 Table 1 of sch 1 sets out a summary of key proposal characteristics.

58 The design life of the plant was not included as a key project characteristic, and MS 757 does not itself impose any limit on the operational life of the Pluto LNG plant.

59 The 2007 Report, in accordance with s 44, set out the factors the EPA considered to be the key environmental factors identified in the course of the assessment. The emission of greenhouse gas was identified as one of the key environmental factors. The implementation conditions in MS 757 included conditions directed to greenhouse gas abatement.

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[31] AXS-3, 112.
[32] TJM-1, 11.
[33] TJM-1, 28.

60 Condition 12-1 required that Woodside, prior to the commencement of construction, develop a greenhouse gas abatement program. The abatement program was required:

> - to ensure that the plant is designed and operated in a manner which achieves reductions in greenhouse gas emissions as far as practicable;
>
> - to provide for ongoing greenhouse gas emissions reductions over time;
>
> - to ensure that through the use of best practice, the total net greenhouse gas emissions and/or greenhouse gas emissions per unit of product from the project are minimised; and
>
> - to manage greenhouse gas emissions in accordance with the Framework;
>
> - Convention on Climate Change 1992, and consistent with the National Greenhouse Strategy;
>
> to the requirements of the Minister for the Environment on advice of the Environmental Protection Authority.[34]

61 The measures required by the program included:

(1) calculation of the greenhouse gas emissions associated with the proposal;

(2) specific measures to minimise the total net greenhouse gas emissions and/or the greenhouse gas emissions per unit of product associated with the proposal;

(3) the implementation and ongoing review of greenhouse gas offset strategies with such offsets to remain in place for the life of the proposal;

(4) estimation of the greenhouse gas efficiency of the project per unit of product and/or other agreed performance indicators;

(5) actions for the monitoring, regular auditing and annual reporting of greenhouse gas emissions and emission reduction strategies;

(6) a target for the progressive reduction of total net greenhouse gas emissions and/or emissions per unit of product and as a percentage of total emissions over time; and

[34] TJM-1, 24.

(7) a program to achieve reduction in emissions, consistent with the target.

62 Condition 12-2 required Woodside, for the life of the project, to provide a greenhouse gas offset package which 'as a minimum, offsets the reservoir carbon dioxide released to the atmosphere'.

63 Changes to the approval were approved in 2008, 2009, and 2010 pursuant to s 45C. The changes increased the allowable land disturbance footprint.

64 A change in implementation conditions was approved, pursuant to s 46, in 2011. That change is not material to the present application.

The Pluto Application

65 A draft of the Pluto Application, dated 19 November 2018,[35] and the Pluto Application which was sent on 13 December 2018,[36] were adduced in evidence as attachments to the affidavit of Mr Sutton. Any differences between the draft and the final application are not material.

66 In the Executive Summary, Woodside reported that the original proposal was for approval of two LNG trains, with a nominal capacity of up to 12 Mtpa, with only one train constructed to date. It continued:

> As part of commencing design and construction activities associated with Train 2 under the existing approval, Woodside will resubmit a revision to the Air Quality Management Plan and the Front End Engineering Design (FEED) Report (required by Condition 11 of MS 757) with the Works Approval for Train 2 in mid-2019. Woodside expect to submit the Greenhouse Gas Abatement Program (required by Condition 12 of MS 757) prior to the commissioning of Train 2.[37]

67 In Part 1, Woodside set out the purpose and scope of the proposed changes, that the application was written in accordance with the Administrative Procedures published by the EPA, and outlined its assessment methodology and scope.

68 Relevantly, in cl 1.3.2, Woodside stated:

[35] AXS-13.
[36] AXS-5.
[37] From pt 6 of the application.

> The proposed changes were assessed against the original proposal and any additional or different (including cumulative) environmental factors and/or associated stressors to the original proposal were identified.[38]

69 Part 2 dealt with the content of the original proposal including its history, details of changes already made, and the current stage of implementation.

70 Part 2 included Table 2.2 which summarised key proposal characteristics in MS 757 and their relevance to the proposed expansion.[39] Relevantly, no changes were proposed in relation to dredging, marine disposal of soil, the gas trunkline,[40] site works, or the product storage facility. The proposed change to the LNG plant, by removing the specification of gas turbine design, did not change the total nominal capacity after the addition of Train 2. The variations also altered export methods. No changes were proposed for domestic gas supply, flares, the export jetty or wastewater treatment.

71 Clause 2.3 set out the stage of implementation, recording that production had commenced in late 2011, with the first LNG cargo shipped in May 2012. The only component in Table 2.2 that was not complete was the second LNG processing train, although bulk earthworks and site preparation had been included during the construction of Train 1.

72 Clause 2.4 was headed Environmental Performance and Compliance with MS 757 to date. Woodside referred to performance reviews it had submitted in 2012 and 2017 to show environmental objectives had been achieved over the two 5-year reporting periods. Woodside also stated that it had provided Annual Environmental Compliance Reports for the period 2008 to 2017, and no non-compliances had been reported (this was confirmed in the assessment process).

73 Clause 2.5 set out changes which had been made to the original proposal in 2008, 2009 and 2010, following earlier approvals pursuant to s 45C; and a change to implementation conditions, pursuant to s 46, which related to marine impacts surveys. None of those changes are relevant to the environmental effects of the changes proposed in 2019. In particular, none relate to emissions or the sources of emissions.

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[38] AXS-5, 209.
[39] Table 2.2, AXS-5, 213 - 214.
[40] Trunkline installation proposed for the Scarborough Development was not part of this application.

74 In Part 3, Woodside identified the content of the proposed changes, and for each proposed change set out the element to be changed, and its reasons for the proposed change. For the proposed change to delete reference to the specific gas field and the North West shelf from MS 757, Woodside said:

> The proposed changes to MS 757 are to clarify that gas from other fields can be processed at Pluto LNG (as per the [Public Environmental Review]); and to allow for consistency with the EPA guidance material (Instructions: Defining the proposal key characteristics) which were released by the EPA after MS 757, and for consistency with other Ministerial approvals. Ministerial Statements must include key elements of the proposal that are likely to have an impact on the environment, are significant and are not regulated by other processes.
>
> The Ministerial Statement does not need to include elements which are not related to significant environmental effects and/or are regulated under other approvals or legislation. Gas fields (in Commonwealth waters) that are developed in the future and tied into Pluto LNG may be subject to their own approvals regime as relevant (i.e. *Offshore Petroleum and Greenhouse Gas Storage (Environment) (OPGGS(E)) Regulations, Environmental Protection and Biodiversity Conservation (EPBC) Act*, *Petroleum (Submerged Lands) (Environment) Regulations* and so on). Therefore, the environmental impact assessment for the development of the offshore component is not regulated by the [*Environmental Protection Act*] and therefore should not warrant inclusion in the Ministerial Statement.
>
> Woodside considers that the reference to the Pluto Gas Field prescribed in MS 757 is not environmentally significant and the onshore emissions relating to the processing of the feed gas will be regulated under Part V of the [*Environmental Protection Act*]. This element of the proposal (i.e. reference to the Pluto Gas Field on the North West Shelf) should therefore be deleted from MS 757. Woodside consider that the name of the gas field itself is not necessary, as any changes to the emissions envelope predicted in the [Public Environmental Review] have to be assessed; and if significant, approval sought under the [*Environmental Protection Act*].
>
> A review of recently issued Ministerial Statements for other significant project developments within WA showed that the source of the feed gas was not described in the Ministerial Statement, in particular the Proposal Description.
>
> The proposed change will enable access to additional gas fields for processing at Pluto LNG. The first of these is the Scarborough Development (e.g. Scarborough, Jupiter, Thebe gas fields), and the

> Pyxis field. Woodside propose to enable future access to additional gas fields via this s. 45C application.[41]

75 Tables 3.1, 3.2 and 3.3 set out (as a marked up document) the proposed changes by reference to sch 1 of MS 757. Relevantly, Woodside distinguished between the reference to the gas field (that is, that gas from other fields could be processed at Pluto LNG) and the regulation of onshore emissions relating to the processing of the feed gas under pt V of the Act.

76 The proposed amendment to the specification of the gas turbines did not alter the total nominal capacity (which had not been met as only Train 1 had been constructed) or the specification of gas turbine technology to be used.

77 Finally, the proposed change to include export via shipping, trucking or piping was said to update the approval 'to reflect previously agreed position on the installation of LNG truck loading facility with Pluto LNG site' and to reflect the export of gas via the DomGas/Interconnector lines offsite. The interconnector lines outside the Pluto lease boundary were to be subject to separate environmental approval mechanisms.

78 Part 4, Detrimental Environmental Effects of the Original Proposal, detailed 'likely detrimental environmental effects of the original proposal relevant to the proposed changes', as the basis of comparing and assessing if the proposed changes to the original proposal have the potential to cause significant detrimental effects in addition to, or different from, the effects of the original proposal. The application stated:

> To ensure the assessment of the detrimental environmental effects for the original proposal is still relevant, the implementation status of the original proposal and compliance with MS 757 to date was summarised in Sections 2.3 and 2.4.[42]

79 In cl 4.1, Woodside identified two environmental factors to which it said the proposed changes were relevant: greenhouse gas emissions and combustion products. Woodside submitted that the proposed changes were not expected to introduce any environmental stressors that were not assessed in the original proposal or to have any

[41] AXS-5, 220.
[42] AXS-5, 226.

detrimental effect on any of the key environmental factors relevant to the proposal.

80 Part 5 then dealt with detrimental environmental effects of the proposed changes. Specifically in relation to gas fields, Woodside said:

> This proposed change allows for feed gas from additional fields to be transported to Pluto LNG for processing. The currently planned developments which would impact Pluto facilities onshore are Pyxis, Scarborough, Jupiter and Thebe (of which the latter three gas fields comprise the Scarborough Development; known as the Scarborough gas fields).[43]

81 After a comparison composition of gas from the different fields, the application continued:

> In consideration of the CO_2, H_2S and N_2 concentrations in the additional feed gas sources, Woodside considers that the combustion products and [greenhouse gas] emissions from any of the proposed future gas fields will not significantly exceed the [greenhouse gas] emissions used for assessment in the [Public Environmental Review] (refer to Table 5-2 in the [Public Environmental Review]). Therefore, the overall greenhouse gas emission intensity, as influenced by the composition of the raw gas stream coming into Pluto LNG, is not significantly different to the original proposal.
>
> This proposed removal of specific gas fields from Schedule 1 allows for additional gas fields to be processed at Pluto LNG in the future. In the event this occurs, any future gas fields will be assessed against the constraints and limits of the existing facilities and the approved emissions envelope described in the PER; and if this leads to a significant increase in potential impact, approval would be sought through relevant approval mechanisms.
>
> Woodside considers that the proposed changes to the proposal description and to the preamble of Schedule 1 to allow flexibility for additional feed gas resources can be adequately managed under the framework of the conditions already set out by the MS 757 and/or under Part V of the [*Environmental Protection Act*], and that no additional conditions or changes to MS 757 are required.
>
> **5.1.2 Associated or Different Detrimental Environmental Effects of the Proposed Change**
>
> As discussed in Section 5.1.1, the detrimental environmental effects of the proposed changes are expected to be substantially the same and therefore will not incur significant detrimental effects in addition to, or

[43] AXS-5, 232.

> different from, the effects of the original proposal. Therefore, no further assessment of environmental effects relating to the additional sources of raw feed gas is required for this application.
>
> **5.1.3 Significance of the Additional or Different Detrimental Environmental Effects of the Proposed Change**
>
> As discussed in Sections 5.1.1 no change to the detrimental environmental effects from the original proposal is expected due to the feed gas sources additional to that described in the [Public Environmental Review] and in the proposal description and preamble to Schedule 1 of MS 757. Therefore, further assessment of the significance of additional or different detrimental effects is not required in this application.[44]

82 In Part 6, Woodside addressed management of the proposed changes. Relevantly, this was discussed by reference to the plans and programs approved for the original proposal which, Woodside submitted, adequately managed the environmental stressors identified for the proposed changes.

83 The following facts were agreed regarding the Pluto Proposal:

> 6. By attachment to an email to EPA Services (a division of the Department of Water and Environment) dated 13 December 2018, the Other Party applied, pursuant to s 45C of the EP Act, to further amend the Pluto Proposal by:
>
> (a) deleting the described gas field from the proposal preamble, to clarify that gas from other fields can be processed at Pluto LNG (as per the Pluto [Public Environmental Review]);[45]
>
> (b) deleting the described gas turbine types used to drive the liquefaction compressors and for power generation from Schedule 1, to allow for greater flexibility in turbine design; and
>
> (c) including gas export via shipping, trucking or piping in Schedule 1, to reflect the existence of the Pluto LNG trucking facility and proposed Pluto-North West Shelf Interconnector.
>
> (the Pluto Application)

[44] AXS-5, 233.

[45] The changes also included deletion of the described gas field, Pluto North West Shelf, from the Proposal Schedule 1.

7. At all material times, the Respondent, as then holder of the office of Chairman of the EPA, was duly delegated by the Minister for Environment by instrument dated 24 November 2004, all the powers and duties conferred or imposed under s 45C of the Environmental Protection Act.

8. Between about 30 April 2019 and 24 June 2019, an Environmental Officer within EPA Services:

    (a) corresponded with the Other Party about the Pluto Application;

    (b) assessed the Pluto Application;

    (c) prepared the Decision Documents, being:

        (i) a memorandum to the Respondent summarising the officer's assessment of the Pluto Application, and making recommendations (the Memorandum);

        (ii) a draft letter to the Other Party from the Respondent advising the Other Party that the Pluto Application had been approved (Chairman's Letter); and

        (iii) a draft new attachment to MS 757, reflecting the changes sought in the Pluto Application.

9. The Decision Documents appear to have been prepared on the basis of templates, copies of which were made available to the Environmental Officer by way of hyperlinks in the Office of EPA's EIA Practitioners Guide.

10. Prior to the Pluto Application being sent by the Other Party to the EPA:

    (a) the EPA was provided with a draft of the Pluto Application; and

    (b) by email dated 12 December 2018, EPA Services requested that the Other Party formally submit a final version of the Pluto Application to the EPA.

84 The correspondence between the assessing officer from EPA Services and Woodside, referred to in par 8(a) of the Agreed Facts, was as follows.

85 On 13 March 2019, Mr Zahra, A/Senior Manager Environmental Compliance of the Department of Water and Environmental

> Regulation, wrote to Woodside following a compliance audit of the Pluto LNG Development, referring to the requirement under condition 12-2 of MS 757 by which Woodside was required to offset 'reservoir carbon dioxide' released to the atmosphere for the life of the project. The letter requested information in relation to discrepancy between the actual annual CO_2e[46] emissions reported for the years 2014 to 2017 and the estimated average annual emissions stated in the Pluto LNG Project Greenhouse Gas Abatement Program. The letter further requested an assessment as to whether the offsets were anticipated to be sufficient over the life of the project, and details of future opportunities available to offset greenhouse gas emissions from Train 1, and a timeline for implementation.[47]

86 Mr Zahra provided the letter to Mr Sutton on 14 March 2019, for the advice of the respondent in relation to the Pluto Application. In forwarding the letter, Mr Zahra noted the letter was 'mostly about a clarification of progress (not necessarily any non-compliance)', and that there were no other outstanding issues as a result of the recent audit.[48]

87 On 24 June 2019, Mr Sutton wrote to Mr Zahra asking if the Department had received a response from Woodside. Mr Zahra replied that Woodside had responded, and was aware of the shortfall and intended to make up the difference. The reply from Woodside is not in evidence.

88 There is a separate line of correspondence, between the Environmental Officer from EPA Services who was preparing the assessment and the Department. The Department confirmed no active non-compliances by Woodside and that an audit had been completed in December 2018 which confirmed compliance.[49]

The making of the decision

89 It was an agreed fact that the respondent acted under a delegation from the Minister.

90 The respondent did not provide a statement of reasons for decision and was under no obligation to do so.[50] The absence of reasons does not prevent review. Inferences may be drawn from the decision itself,

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[46] Carbon dioxide equivalent.
[47] AXS-17, 411.
[48] AXS-17, 409.
[49] AXS-17, 414.
[50] ***Public Service Board (NSW) v Osmond*** [1986] HCA 7; (1986) 159 CLR 656; ***Wingfoot Australia Partners Pty Ltd v Kocak*** [2013] HCA 43 [43].

and from contemporaneous documents, including the materials that were before the decision maker.

91 Even where reasons are provided, but not subject to any statutory requirements to set out material findings, caution is required as to what inferences may be drawn from them; particularly, from what is not said.[51] Necessarily, even greater caution is required in drawing inferences from documents which might record a decision but do not purport to state the reasons for making it.

92 Mr Sutton's evidence was not challenged. Apart from the agreed facts, Mr Sutton deposed to the following matters.

93 EPA Services receives on average 34 applications for s 45C approval each year. Dr Hatton, who held the position of Chairman of the EPA at the time of the decision, was appointed in November 2015 and had made more than 100 decisions under s 45C at the time of this decision.

94 In May 2016 - that is, while Dr Hatton was Chairman - the Department prepared a simplified hierarchical policy framework for the EPA. As part of that new policy framework, the Procedures Manual was first published and a Practitioner's Guide was prepared to assist assessment officers within the Department.

95 The Practitioner's Guide contained hyperlinks to a number of template document including:

- a Recommendation to Chairman Memo - s 45C Change to Proposal;
- Letter to Proponent (Outcome) (Letter Content) - s 45C Change to Proposal; and
- a Policy Considerations Table.[52]

96 The Administrative Procedures were published in the Government Gazette on 13 December 2016. Relevantly, cl 5.3 provided:

> **5.3 Changes to proposals after s. 45(5) statement issued (s. 45C)**
>
> Proponents may request a change to a proposal by writing to the Minister.

[51] See, for example, ***Jacob v Save Beeliar Wetlands (Inc)*** [2016] WASCA 126; (2016) 50 WAR 313, [53].
[52] Affidavit of Anthony Xavier Sutton affirmed 31 May 2021 [19] - [22].

> The Minister may approve of a proponent changing a proposal after a Ministerial Statement is issued, without referring a revised proposal to the EPA (s. 45C(1)).
>
> The Minister must not give approval under s. 45C(1) if the Minister considers that the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal (s. 45C(2)).
>
> The Minister either -
>
> - approves a change to a proposal if the Minister considers that the change or changes to the proposal is unlikely to have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal or
>
> - does not approve a change to a proposal if the Minister considers that the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal.
>
> If the Minister does not approve a change to proposal, the proponent may refer the change to proposal to the EPA under s. 38.[53]

97 The procedures in the Practictioner's Guide,[54] included:

- Administrative steps: to review the changes against the original key characteristics and any subsequent 's 45C's'; consider whether the proposed changes potentially need to be referred through s 38; identify if any changes to conditions are required; confirm with Compliance Branch that the proponent is compliant with conditions; discuss changes with Section PEO, Manage and Director ACD, and if required by the Chair, for agreement on approvals pathway;

- Assessment Steps: including 'detailed assessment of information against the six aspects'; determine if internal or external technical advice is required;

- Preparation of Documents and Compliance Steps, which included links to template documents; and

- Approval and Publishing Steps.

[53] AXS-6.
[54] AXS-8, 278.

98 The Pluto Application (including the draft) was before the EPA for seven months before the decision on it. Mr Sutton said that when the Pluto Application was made, officers of EPA Services were expecting it, as it had been generally foreshadowed in meetings they had attended with Woodside to discuss a number of the company's projects. Mr Sutton's recollection was that the respondent attended most of these meetings in his capacity as Chairman of the EPA.[55] There is no specific evidence about what was discussed at those meetings.

99 The following were agreed facts:

> 11. It was common for EPA Services branch managers and/or the Executive Director of EPA Services, Mr Anthony Sutton, to discuss s 45C applications with the Respondent while they were being assessed by EPA Services, including at a standing fortnightly meeting between the Respondent and each of the branch managers.
>
> 12. During the period in which EPA Services was assessing the Pluto Application, Mr Sutton recalls discussing proposals of [Woodside] relating to the 'Burrup Hub' with the Respondent. However, Mr Sutton does not recall any specific discussions that he had with the Respondent about the Pluto Application.
>
> 13. The Memorandum, amongst other things, summarised various matters, including the conclusion reached by EPA Services in relation to its assessment of the Pluto Application that 'there is a high degree of confidence that the proposed changes will not have a significant detrimental effect on the environment that is additional to, or different from the effect of the original proposal'. The Memorandum recommended that the Respondent:
>
> (a) note that [Woodside] has proposed changes to the Pluto Proposal (MS 757 as amended by Ministerial Statement 850) as detailed in the Memorandum;
>
> (b) note that EPA Services considers it unlikely that the proposed changes will have a significant detrimental effect on the environment that is additional to, or different from, the effect of the original proposal;
>
> (c) approve the changes to the proposal under s 45C of the Environmental Protection Act by signing attachment 5 to MS 757; and
>
> (d) sign an attached letter to [Woodside].

[55] Affidavit of Anthony Xavier Sutton affirmed 31 May 2021 [18].

14. The Memorandum was endorsed by the Acting Manager of the 'EIA North' branch of EPA Services and Mr Sutton, on 28 June 2019.

15. On 1 July 2019, but at a time unknown, Mr Sutton and the Acting Manager of EIA North met with the Respondent to discuss the Pluto Application.

16. At that meeting, Mr Sutton gave the Respondent the Decision Documents and the hard copy file maintained by EPA Services for the Pluto Application, which included:

    (a) a draft of the Pluto Application;

    (b) the Pluto Application;

    (c) the Part V Environmental Protection Act licence for the Pluto LNG Plant;

    (d) a Pluto LNG Project Air Quality Management Plan dated 7 September 2011;

    (e) correspondence between [Woodside] and EPA Services;

    (f) correspondence between EPA Services and the Compliance and Enforcement Directorate of Department of Water and Environment, which correspondence included emails between EPA Services and the Compliance and Enforcement Directorate attaching a letter dated 13 March 2019 from Department of Water and Environment to the Other Party;

    (g) MS 757 as it was at the time.

17. These documents total at least 221 pages.[56]

18. The letter dated 13 March 2019 (referred to at paragraph 16(f) above) referred to a letter dated 10 January 2019 from [Woodside] to Department of Water and Environment, which letter was actually dated 9 January 2019 and emailed on 10 January 2019.

19. [Woodside] responded to Department of Water and Environment's letter dated 13 March 2019, by letter of 3 May 2019.

[56] The Pluto Application itself was 44 pages.

> 20. The documents on the hard copy file for a section 45C application would not necessarily include all documents that an assessment officer had considered as part of their assessment of a section 45C application. In particular, copies of key documents concerning the proposal already held by Department of Water and Environment, such as the Pluto Public Environmental Review, which were often voluminous, would not be placed on the hard copy file for the Pluto Application. These documents were otherwise available to the Respondent via the EPA's website, Department of Water and Environment's records or as requested.
>
> 21. Mr Sutton and the Acting Manager of EIA North generally talked the Respondent through the Memorandum and Mr Sutton showed the Respondent the conditions of MS 757 (as amended by Ministerial Statement 850) that dealt with the air and greenhouse gas emissions caused by the processing of gas at the Pluto gas plant.
>
> 22. On 1 July 2019, but at a time unknown to Mr Sutton, the Respondent approved (the applicant says purportedly approved) the Pluto Application (Pluto Decision) and signed the Decision Documents.

100 Because Mr Sutton's recollection of his discussions with the respondent is only general, and the respondent has not filed evidence, I cannot make any finding about the extent and the detail of discussions at which the respondent was present or participated before making the decision.

101 Mr Sutton stated that the respondent's general practice was to annotate any amendments he wanted to make to decision documents before he signed them. Mr Sutton could not recall whether the respondent requested any amendments to the decision on the Pluto Application, and the file maintained by EPA Services has no record of annotated amendments.

102 The letter to Woodside, advising them of the approval, is dated 1 July 2019. Relevantly, it said:

> I consider the changes, as described in Attachment 5 to Ministerial Statement 757, are unlikely to result in a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal. Approval of the changes is therefore granted under section 45C. This approval does not replace any responsibilities you may have for seeking approvals from other government agencies to implement the changes.

> Please note implementation of the Pluto Liquefied Natural Gas (LNG) Project proposal, including the approved changes described in Attachment 5, is subject to the conditions of Ministerial Statement 757. The Chief Executive Officer of the Department of Water and Environmental Regulation may monitor the implementation of the proposal for the purpose of determining whether the implementation conditions are being complied with.[57]

The grounds of the application

103 The application, as amended, contained two grounds, ground 1 containing three alternatives. The applicant also filed particulars of each ground.

104 Generally, each ground challenged whether the respondent lawfully formed the opinion required by s 45C(2) and each alleged a separate specific error, related to the requirements of the sub-section.

Ground 1(a)

> The purported exercise of the discretion in s 45C(1) of the *Environmental Protection Act 1986* by the respondent was beyond power because on its proper construction, s 45C requires the decision maker to personally perform the duty imposed on him or her by s 45C(2) (being the forming of an opinion as to whether the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal) as a prerequisite to the exercise of the discretion in s 45C(1), and the respondent did not personally perform the duty in s 45C(2);
>
> Particulars of Ground 1(a)
>
> 1. By briefing note titled Recommendation – Change to Proposal dated 24 June 2019 addressed to the First Respondent (Briefing Note), the Environmental Protection Authority Services Directorate of the Department of Water and Environmental Regulation (Directorate):
>
> a. summarised an application under s 45C by the Other Party (s 45C Application) which proposed changes the Pluto Liquified Natural Gas Development proposal (Ministerial Statement 757 as amended by Minister Statement 850) (Pluto Proposal);
>
> b. proffered an assessment of the proposed changes to the Pluto Proposal as set out in the s 45C Application;

[57] AXS-20.

c. recommended to the First Respondent that he:

i. note that the Other Party had proposed changes to the Pluto Proposal as detailed in the Briefing Note;

ii. note that the Directorate had formed the view that the proposed changes to the Pluto Proposal were unlikely to have a significant detrimental effect on the environmental that is additional to, or different from, the effect of the original Pluto Proposal;

iii. approve the proposed changes to the Pluto Proposal by signing the draft Attachment 5 to Ministerial Statement 757 which was attached to the Briefing Note; and

iv. sign a draft letter to the Other Party which was attached to the Briefing Note.

2. The Briefing Note did not attach the s 45C Application.

3. The Briefing Note did not recommend or invite the First Respondent to form, for himself, a view about the environmental effect of the proposed changes to the Pluto Proposal whether by adopting the Directorate's opinion or otherwise.

4. The First Respondent did not form, for himself, a view about the environmental effect of the proposed changes to the Pluto Proposal.

105 The following matters were not in dispute.

106 First, the power under s 45C(1), and the duty to consider the matters in s 45C(2), are personal to the respondent, as delegate of the Minister.

107 Second, if all that the respondent did was sign the decision documents and letter to Woodside, without forming the opinion referred to in s 45C(2), then he did not make a decision in accordance with s 45C. Section 45C(2) requires the decision-maker to engage in an 'active intellectual process' to evaluate, and to form an opinion as to, whether the relevant change or changes might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal.

The applicant's case

108 The applicant's primary argument was that the proper inference to be drawn from the evidence is that the respondent failed to engage in that process.

109 The applicant relied on the following contentions (to a large extent restating the particulars):

(1) The Memorandum did not note the need for the respondent to consider the matter for himself and to reach his own conclusion, or invite, or recommend the respondent to consider the matter for himself and to reach his own conclusion.

(2) The Memorandum provided no material with which the respondent might have engaged in his own active intellectual process directed at whether the proposed changes 'might' have the requisite effect.

(3) The memorandum provided no assessment as to the environmental impact of the original proposal in relation to Air Quality and Greenhouse Gas, and did not address the environmental effect of the Pluto Proposal as it has been implemented in fact.

(4) In its assessment on Aspect 4, the memorandum did no more than express EPA Services' conclusions as to the expected environmental effect of the proposed change, and that the impacts can be managed under the existing framework without amendment.

(5) Aspects 5 and 6 of Table 1 to the Memorandum did no more than express EPA Services' conclusions in terms that mirror the relevant statutory test.

(6) The discussion between the respondent, Mr Sutton and the Acting Manager of EIA North was limited to generally talking the respondent through the Memorandum and showing him the conditions of the Ministerial Statement relating to air quality and greenhouse gas emissions.

There is no evidence that the respondent considered any document other than the Memorandum and the conditions of MS 757, or requested or obtained any other documents.

(7) The respondent's Letter was prepared by EPA Services in terms which reflected the opinion formed by EPA Services, and in language which mirrored the template in the Practitioners Guide.

(8) The respondent's Letter was issued without amendment on the day he was provided with the Decision Documents which totalled more than 220 pages. The letter itself discloses no active intellectual process.

110 Further, the applicant submitted that it is unlikely the respondent had time to consider the Pluto Application in the manner required by s 45C before he signed the letter to Woodside.

111 The applicant submitted that the Court should infer:

(1) the only assessment conducted of the Pluto Application was the assessment contained in the Memorandum;

(2) the respondent relied entirely on the Memorandum and, save for the conditions imposed under MS 757 which Mr Sutton showed him, did not consider any other documents provided to him;

(3) the respondent did not himself assess the Pluto Application; and

(4) the letter did not reflect a considered view reached by the respondent, but adopted the 'mere verbal formulae' contained in a departmental template.

112 The Memorandum does not itself contain an evaluation of the kind required by s 45C(2), but repeats parts of the 2007 Report with no assessment of the environmental impact of the original proposal in relation to air quality or greenhouse gas and no attempt to identify the detrimental effects on the environment of the proposed changes.

113 The applicant submitted that the court should find that the respondent did not discharge the duty entrusted to him. In that way, the decision to approve the changes to the Pluto Proposal was vitiated by jurisdictional error.

114 The applicant further submitted that the inferences it sought to have the court draw may be supported, if necessary, by a properly drawn ***Jones v Dunkel*** inference.

The State's case

115 The State submitted that there is nothing in the nature, scope or purpose of the discretionary power conferred by s 45C to demonstrate a legislative intention that the Minister cannot consider and act upon departmental advice, or must personally read all of the underlying primary documents.[58]

116 The State submitted that the powers are conferred on the Minister, and/or their delegate, who are administrative decision-makers, intended to function informally and make decisions expeditiously. In particular, the State submitted that the opinion required by s 45C may require particular expertise which the Minister or delegate may not personally possess.

117 The State submitted that, in any event, the evidence shows that the respondent, as delegate of the Minister, did himself engage in the necessary evaluation required by the section. Alternatively, the State submitted that the applicant has not proved that the respondent did not himself make the necessary evaluation of the proposal.

Woodside's case

118 Woodside relied on similar submissions to those made by the State. It submitted, in effect, that the applicant had not discharged its onus of proving that the respondent did not engage in the intellectual process required by s 45C(2). Woodside submitted that the inference that the respondent did no more than read the Memorandum and follow its recommendations does not arise as a reasonable inference on the evidence.

119 Woodside further submitted that the collective technical and factual knowledge of the civil servants in the EPA, and their collective expertise and experience, is to be treated as the Minister's (or delegate's).[59] So long as the respondent engaged in an 'active intellectual process' with regard to whether the changes might have the detrimental effect referred to in s 45C(2), he may rely solely on a departmental summary to form his opinion. Properly construed, s 45C

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[58] ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** [1986] HCA 40; (1986) 162 CLR 24, 30 - 31; 65 - 66.

[59] ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd***, 66; ***Asiamet (No 1) Resources Pty Ltd v Commissioner of Taxation (Cth)*** (2003) 126 FCR 304, [116]; ***Seafish Tasmania Pelagic Pty Ltd Ltd v Minister for Sustainability, Environment, Water, Pollution and Communities (No 2)*** [2014] FCA 117; (2014) 225 FCR 97, [94].

did not require the respondent to read and consider anything other than the Memorandum.

Consideration

120 The dispute between the parties, ultimately, was not regarding the law to be applied in this application, but the inferences that should properly be drawn from the agreed facts, the evidence of Mr Sutton, and the documents.

121 Having regard to all of the material before the Court, I am not satisfied that I should draw the factual inferences on which the applicant relied.

122 In particular, I am not satisfied that the only assessment conducted of the Pluto Application was that by the EPA Services officer who prepared the Memorandum; or that the respondent relied entirely on the Memorandum and, except for the conditions imposed under MS 757 which Mr Sutton showed him, did not himself consider whether to approve the Pluto Application.

123 The Memorandum did not note the need for the respondent to consider the matter for himself and to reach his own conclusion or invite, or recommend that the respondent consider the matter for himself and reach his own conclusion. The uncontested evidence, however, was that the EPA deals with, on average, 34 applications under s 45C a year, and Dr Hatton had himself dealt with over a hundred such applications. Dr Hatton had been in the position of Chairman for about four years at the time of the decision, and was in that position when the Administrative Procedures were published as part of a new policy framework following the *Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the Environmental Protection Act 1986* (WA) in May 2016.[60] I would not assume that he needed to be told about the nature of his statutory duty on each occasion when the power in s 45C(1) was to be exercised.

124 The applicant also contended that the Memorandum provided no material from which the Chairman might have engaged in his own active intellectual process directed at whether the proposed changes might have the requisite effect. The argument assumes that the

[60] Affidavit of Anthony Xavier Sutton affirmed 31 May 2021 [20].

respondent had no other relevant material available to him, and did not have regard to anything other than the Memorandum.

125 The respondent was not, like a court or tribunal, acting solely on the evidence presented at a hearing or on the occasion the decision was made. Mr Sutton could not recall details of the discussion with the respondent on 1 July 2019, other than that he and the Manager generally talked the respondent through the memorandum of advice from EPA Services, and Mr Sutton showed the respondent the conditions in MS 757 that dealt with the air and greenhouse gas emissions caused by the processing of gas at the Pluto Gas Plant.[61] But his unchallenged evidence was that the documents provided to the respondent, and the discussion on 1 July 2019, were not the only information to which the respondent may have had regard.

126 First, before the Pluto Application was received, it had been generally foreshadowed in meetings with Woodside to discuss a number of the company's projects. Mr Sutton's recollection was that the respondent attended most of these meetings.

127 Second, the assessment of the Pluto Application was a process carried on over about seven months. It is an agreed fact that it was common for EPA Services branch managers or Mr Sutton, to discuss s 45C applications with the respondent while they were being assessed by EPA Services, including at a standing fortnightly meeting.

128 Third, Mr Sutton could recall discussing Woodside's proposals for the Burrup Hub with the respondent, although he could not recall any specific discussion about the Pluto Application.

129 On 1 July 2019, Mr Sutton gave the respondent the hard copy file with:

(a) a draft of the Pluto Application;

(b) the Pluto Application;

(c) the Part V Environmental Protection Act licence for the Pluto LNG Plant;

(d) a Pluto LNG Project Air Quality Management Plan dated 7 September 2011;

[61] Affidavit of Anthony Xavier Sutton affirmed 31 May 2021 [38].

(e) correspondence between Woodside and EPA Services;

(f) correspondence between EPA Services and the Compliance and Enforcement Directorate of Department of Water and Environment, which correspondence included emails between EPA Services and the Compliance and Enforcement Directorate attaching a letter dated 13 March 2019 from Department of Water and Environment to Woodside;

(g) MS 757 as it was at the time.

130 Copies of other documents were available to the respondent via the EPA website and Department records.

131 It is probable that the respondent not only had regard to the Memorandum, but accepted the conclusions and recommendations in it. It is also likely that the respondent had information about the application from meetings and discussions before 1 July 2019. I am not satisfied that I should draw the inference for which the applicant contends from the summary nature of the Memorandum, and the limited discussion with Mr Sutton and the Branch Manager on 1 July 2019. It is but one possible inference.

132 I have had regard to the use of template documents, including the letter; and the fact that the respondent did not amend the letter. The letter was in very general terms, expressed in accordance with a long standing precedent, and was to advise Woodside of a favourable decision. It was, in its terms, not intended to provide reasons other than in the most general way.

133 Finally, this is not a case where the inference that the respondent did not consider relevant material can be drawn from the result of the application. And that is not how the applicant put its case.

134 It is not necessary to consider whether the respondent could have acted solely on the basis of reading and considering the Memorandum, with no knowledge of information in the supporting documents, including the Pluto Application. The applicant has not satisfied me that I should infer that is all that he did.

Jones v Dunkel

135 The applicant's case on ground 1(a) was based on the inferences to be drawn. The applicant submitted that the rule in ***Jones v Dunkel*** applies in judicial review proceedings. The fact that the respondent did

not give evidence by filing an affidavit as to the making of the decision is not sufficiently explained by the respondent filing a submitting appearance, nor is it explained by the generally accepted practice that administrative decision makers, or members of administrative tribunals do not, as a rule, participate actively in judicial proceedings reviewing their decisions or actions.[62] The applicant submitted that the court might more confidently infer that the respondent did not personally perform the duty in s 45C.

136 The applicant points to authorities where the rule has been applied in drawing an inference about the time a decision maker spent considering material and making a decision. The circumstances there supported an inference that there was not sufficient time to allow an active intellectual process to be directed to the relevant material.[63]

137 The proper application of the rule was set out by the plurality in ***Australian Securities and Investments Commission v Hellicar***:

> Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. Principles governing the onus and standard of proof must faithfully be applied. And there are cases where demonstration that other evidence could have been, but was not, called may properly be taken to account in determining whether a party has proved its case to the requisite standard. But both the circumstances in which that may be done and the way in which the *absence* of evidence may be taken to account are confined by known and accepted principles …
>
> Lord Mansfield's dictum in ***Blatch v Archer***[64] that '[i]t is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted' is not to be understood as countenancing any departure from any of these rules …
>
> This Court's decision in ***Jones v Dunkel*** is a particular and vivid example of the principles that govern how the demonstration that other evidence could have been called, but was not, may be used. … the Court held 'that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the

[62] ***R v Australian Broadcasting Tribunal; Ex parte Hardiman*** (1980) 144 CLR 13,36.
[63] ***Chetcuti v Minister for Immigration and Border Protection*** [2019] FCAFC 112; (2019) 270 FCR 335; ***Carrascalao v Minister for Immigration and Border Protection*** [2017] FCAFC 107 [130].
[64] ***Blatch v Archer*** (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

> defendant and the evidence provides no sufficient explanation of his absence'.[65]

138 There is a second important aspect of the reasons in ***Jones v Dunkel***. The applicant bears the onus of proof on disputed facts relevant to its challenge. For the court to be satisfied that the respondent did not himself form the opinion required by s 45C, the facts proved must give rise to a reasonable and definite inference, not merely to conflicting inferences of an equal degree of probability so that the choice between them is a mere matter of conjecture.[66]

139 The applicant has not established the factual foundation for this ground to be upheld. When I have regard to the long period in which the application was with the EPA, the meetings and discussions attended by the respondent, the availability to the respondent of other information, and the briefing by Mr Sutton on 1 July 2019 (even if Mr Sutton can only recall it generally), I am not satisfied that I should draw the inference for which the applicant contends. The failure of the respondent to himself give evidence about making the decision does not alter that conclusion.

140 It is not necessary to consider whether the error alleged in this ground was material to the decision of the respondent.

Ground 1(b)

> The purported exercise of the discretion in s 45C(1) of the *Environmental Protection Act 1986* by the respondent was beyond power because on its proper construction, s 45C(2) requires, as a jurisdictional fact enlivening the discretion in s 45C(1), the respondent to form an opinion as to whether the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal, and the respondent - if he did personally perform the duty in s 45C(2) - did not form that opinion but, rather, applied a different standard than that imposed by the statute.
>
> **Particulars of ground 1b**
>
> 1. Section 45C(2) required the delegate to form an opinion as to whether the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal.

[65] ***Australian Securities and Investments Commission v Hellicar*** (2012) 247 CLR 345 [165] - [167].
[66] ***Henderson v Queensland*** (2014) 255 CLR 1 [89]; ***Jones v Dunkel*** 304; see also ***Girlock (Sales) Pty Ltd v Hurrell*** (1982) 149 CLR 155, 161 - 162; ***Trustees of the Property of Cummins (A Bankrupt) v Cummins*** (2006) 227 CLR 278 [34].

> 2. If, alternatively to ground 1(a), the delegate formed an opinion, the opinion formed was that the changes to the proposal were unlikely to result in a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal.

The applicant's case

141 The applicant submitted that the respondent misunderstood the nature of the opinion he was required by s 45C(2) to form. The respondent was required by s 45C to form an opinion as to whether the changes proposed in the Pluto Application *might* have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal. The court should infer that the opinion formed was not that required by the section, but that the respondent considered whether the changes, as described in Attachment 5 to MS 757, were 'unlikely' to have that result.

142 The applicant submitted that the inference that the wrong standard was used should be inferred from the terms of the letter advising Woodside of the decision, and also from the use of the word 'unlikely' in the Administrative Procedures which informed the internal processes that led to the Pluto Decision, the templates which formed the basis of the Decision Documents, and the Memorandum (including the assessment in Table 1).

143 The applicant submitted that, on the ordinary meaning of 'unlikely', the respondent has formed the opinion that it was less than likely that the relevant change or changes will have the requisite effect. In contrast, the term 'might' in s 45C(2) connotes that there is a reasonable possibility that the relevant change or changes will have the requisite effect. To say that a change is unlikely to have an effect is not the same as saying that there is no reasonable possibility that it will.

144 The applicant further submitted that the expression 'high degree of confidence' in the memorandum and template is also inconsistent with the standard required by s 45C(2) – even if he had a high degree of confidence that significant harm would not occur, the respondent needed to consider whether it might.

145 The applicant submitted that there is no evidence that the respondent had regard to internal departmental documents. Further, the Administrative Procedures and Procedures Manual did little more than repeat the language of the section, introduce the erroneous language of 'likely', and restate the six steps from ***Elwood***.

146 Finally, the applicant submitted that the respondent was the chairman of the EPA, which was required under the Act to be an independent expert body. In particular, the applicant submitted (in response to submissions by the State) that the protective nature of the Act generally, and the condition imposed by s 45C(2), are inconsistent with any suggestion that decisions under s 45C are to be made informally and expeditiously.

The State's case

147 The State submitted that the court should have regard to the fact that the respondent is not a legally qualified decision-maker, and that the respondent's letter of 1 July 2019 should be assessed having regard to the well-settled general principles for the review of the reasons for an administrative decision.[67]

148 The State further referred to the language of s 45C(2) and the difficulty in expressing the required opinion using the precise wording of that section. The State submits that the use of the phrase 'unlikely to result in' in the letter and the memorandum should not lead the court to conclude that the respondent misunderstood or misapplied the test in s 45C(2), rather than simply putting a 'gloss' on it.

149 The State further submitted that the respondent's reasons for making the decision are reflected by his endorsement of the memorandum by signing next to the word 'accepted'. The terms of that memorandum included the expression 'a high degree of confidence that the proposed changes will not have a significant detrimental effect', an expression which, the State submitted, is of the same effect and in substance reflects the correct approach required by the section.

150 Further, the State submitted that the memorandum correctly dealt with the six steps of the ***Elwood*** test, including in the way it set out of the six aspects in the left-hand column of the table to the memorandum.

151 The State submitted that the letter should be construed in the context of the Administrative Procedures and the template. The State submitted that the Administrative Procedures could be construed in accordance with general principles of statutory interpretation, having regard to their text so as to promote their underlying purpose or object and to ensure their validity.

[67] See, for example, ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** (1996) 185 CLR 259, 271.

152 The State referred to the construction of the word 'likely' in other statutory contexts where it has been held to refer to 'a real or not remote chance or possibility'.[68]

153 Finally, the State submitted, consistently with the onus of proof, that the court should not be satisfied that the respondent did not apply the correct test pursuant to s 45C.

Woodside's case

154 Woodside submitted that the letter of 1 July 2019 was not a statement of reasons or a statutory decision, but was no more than a communication from the respondent to Woodside. The reasons for decision are set out in the memorandum signed by the respondent. That memorandum contains not only conclusions but reasons, when the respondent's letter has no reasons at all.

155 Woodside also referred to the authorities on the proper approach to the reasons of an administrative decision maker.

156 Woodside submitted that, in the context of the memorandum, and in particular the statement of advice regarding the fifth and sixth aspects in the table, the word 'likely' in the letter, and in the recommendation in the memorandum, does not correctly express the opinion formed. Woodside referred, in particular, to the advice that there was a high degree of confidence that the proposed changes would not have a significant detrimental effect. A high degree of confidence is not consistent with there being a reasonable possibility that the changes would have a significant detrimental effect.

Consideration

157 The respondent was required by s 45C(2) to form an opinion as to whether the changes proposed in the Pluto Application *might* have a significant detrimental effect on the environment in addition to or different from the effect of the original proposal. The connotation of the word 'might', in s 45C(2) was considered by Buss JA in ***Elwood***:

> In my opinion, s 45C(2) imposes on the Minister an obligation to evaluate whether the relevant change or changes 'might' have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal. The word 'might' is the past tense of 'may' and, in this context, connotes that there is a

[68] See the discussion of the authorities by Rangiah J in ***Polaris Coomera Pty Ltd v Minister for the Environment*** [2021] FCA 254, [203] - [228].

> reasonable possibility that the relevant change or changes will have the requisite effect. If the Minister 'considers' (that is, in this context, forms the opinion) that there is a reasonable possibility that the relevant change or changes will have a significant detrimental effect on the environment etc, the power of approval under s 45C(1) is not exercisable. If, however, the Minister forms the opinion that there is no reasonable possibility that the relevant change or changes will have that effect, the power may be exercised. It is not a condition precedent to the power under s 45C(1) becoming exercisable that, as a matter of objective fact, there is no reasonable possibility that the relevant change or changes will have a significant detrimental effect on the environment etc. Rather, it is the existence of the Minister's opinion on that issue which enlivens the power. [105]

158 The words 'reasonable possibility' are not found in the section. His Honour was attempting to give content to the terms of the section and offer guidance on its application.

159 The word 'unlikely' can have the meaning for which the applicant contends. But, as submitted by the State, 'likely' and 'unlikely' are not always used as the equivalent of probable or improbable. Their meaning depends on the particular context in which those terms are used.

160 In the present case, the court is not construing an instrument, or even attempting to ascertain the intended meaning of reasons for decision. The respondent was not required to give reasons for his decision on the application, and did not purport to do so. The court must ascertain whether the respondent did not form the opinion required by s 45C(2) by inference from documents, including the letter to Woodside, that do not purport to be a statement of reasons.

161 Ground 1(b) was an alternative to ground 1(a). The applicant argued that, by not amending the recommendation and the letter prepared for him, the respondent made and expressed his decision as a finding that a significant detrimental effect on the environment was 'unlikely'. While I am not satisfied that the applicant has proved that the respondent did not personally consider the question in s 45C(2), that finding does not require the court to ignore that the documents provided to the respondent followed internal guidelines and were based on template documents.

162 The evidence of Mr Sutton was that the procedures were introduced following publication of the *Independent Legal and Governance Review into Policies and Guidelines for Environmental*

Impact Assessments under the Environmental Protection Act 1986 (WA) in May 2016. Dr Hatton was appointed Chairman of the EPA in November 2015 and accordingly was in that position when the review and Administrative Procedures were published. The Administrative Procedures are important elements of the context in which the decision and the letter to Woodside must be read.

163 The Administrative Procedures correctly stated, in accordance with s 45C(2), that the Minister must not give approval under s 45C(1) if the Minister considers that the change or changes to the proposal might have a significant detrimental effect on the environment in addition to, or different from, the effect of the original proposal. While the Administrative Procedures referred to a change being approved if the Minister considers the change is unlikely to have a significant detrimental effect, that statement was immediately followed by a second correct statement of the effect of s 45C(2).

164 The templates which formed the basis of the Decision Documents, provided for a recommendation that the respondent approved the change where, following assessment, 'the EPA Services considers that there was a high degree of confidence that the proposed changes will not have a significant detrimental effect …'. While the recommendations then are expressed in terms that 'it is unlikely' that the proposed changes will have a significant detrimental effect, that conclusion must be read in the context of the whole document and the Administrative Procedures by reference to which it was prepared.

165 The Memorandum to the respondent was consistent with the template in expressing a 'high degree of confidence'.

166 The Memorandum was the most comprehensive of the documents before the respondent. It has an attached table[69] which addressed 'Six Aspects (relevant to the proposed changes)' and a statement of the EPA Services advice. The six aspects were:

(1) identification of the content of the original proposal;

(2) identification of the content of the relevant change and determine whether the relevant change involves a revision of the original proposal;

[69] AXS-19.

(3) determination as to whether the original proposal has had or will have any detrimental effect on the environment and, if so, what: assessed by reference to seven factors, including air quality and greenhouse gas;

(4) determination as to whether the change to the original proposal might (in the Minister's opinion) have any detrimental effect on the environment and, if so, what.

(5) determination as to whether the detrimental effect (if any) which the change might have on the environment is additional to, or different from, the detrimental effect (if any) which the original proposal has had or will have;

(6) determination as to whether any detrimental effect which the change to the original proposal might have on the environment, which is additional to, or different from, any detrimental effect which the original proposal has had or will have is, in the circumstances, significant.

167 In advising on the fourth aspect, the Memorandum stated:

> The proposed changes to Schedule 1 and to the Proposal *considered minor and unlikely to cause consequence* to the original proposal:
>
> - Are *not expected to result in* significant detrimental effects in addition to, or different from, the effects of the original proposal;
>
> - Can be adequately managed under the framework of the conditions already set out in MS 757 and under Part V of the Environmental Protection Act 1986;
>
> - No additional management measures from those applicable to the original proposal are required.

168 On the fifth aspect, EPA Services advised that the proposed change was not considered to cause *any* detrimental effect additional to, or different from the detrimental effects of the original proposal.

169 On the sixth aspect, the advice was that *no* additional or different environmental effects had been identified and the changes were not of a scale or intensity to be significant.

170 The documents are not consistent in stating the test in the words of the section, although the correct statement of s 45C(2) is part of the

Administrative Procedures and is reflected in 'aspects' 4, 5 and 6 of the memorandum. The documents do not use the term 'reasonable possibility', but neither does s 45C.

171 When regard is had to all of the documents, I am not satisfied that the correct inference is that 'unlikely' was used in the sense of 'less probable than not'. It follows that I am not satisfied that the respondent misunderstood the test that he was to apply, or that he applied the wrong test.

172 The applicant has not proved the error alleged.

173 Again, the issue of materiality does not arise.

Ground 1(c)

Ground 1c

The purported exercise of the discretion in s 45C(1) of the *Environmental Protection Act 1986* by the respondent was beyond power because on its proper construction, the decision maker was required by s 45C(2), in forming the opinion which that sub-section requires as a jurisdictional fact enlivening the discretion in s 45C(1), to evaluate the detrimental effect which the original proposal, as implemented in fact, has had or will have on the environment, and the respondent (if he did perform the duty in s 45C(2) and if he did apply the correct standard) did not carry out that evaluation, and therefore did not form the required opinion, in that the only evaluation conducted was of the original proposal as it was contemplated under the assessment and authorisation procedure set out in s 40 and s 45 of the Act.

Particulars of ground 1c

1. The Other Party's Public Environmental Review dated 11 December 2006 (PER) described the environmental impacts which were expected to occur should the original proposal be approved.

2. The Environmental Protection Authority's (EPA) assessment of the original proposal and its recommended environmental conditions should the original proposal be approved for implementation were set out in the EPA's Bulletin 1259 dated 9 July 2007.

3. The Minister, in approving the implementation of the original proposal pursuant to s 45, adopted the EPA's recommended environmental conditions as conditions 1 to 12 and 14 (and added Condition 13) in Ministerial Statement No #757 dated 24 December 2007 (MS757).

> 4. Prior to the decision under challenge, MS757 has been amended on four occasions (three changes to the proposal and one change of implementation conditions) since it was issued, on 6 May 2008, 20 August 2009, 29 March 2010 and 24 January 2011.
>
> 5. The original proposal (as amended) has been implemented since at least 2007, subject to the conditions contained in MS757.
>
> 6. Several conditions in MS757, including but not limited to condition 12, require reporting of actual environmental impacts of the original proposal, including over the life of the proposal.
>
> 7. The assessment by the EPA Services Directorate of the Other Party's s 45C application presented an assessment of the detrimental environmental effects of the original proposal solely by reference to the expected detrimental environmental effects as at the date of and as described in the PER.
>
> 8. The EPA Services Directorate's assessment of the Other Party's s 45C application evaluated the detrimental environmental effects of the original proposal as it had been implemented in fact, whether by reference to reports received pursuant to the conditions imposed by MS757 or otherwise.

The applicant's case

174 The applicant contended that the respondent failed to undertake the comparison required by s 45C because he did not evaluate the effect that the Pluto Proposal has had in fact.

175 The applicant relies on the reasons of Buss JA in ***Elwood***, where his Honour said:

> In my opinion, the comparison which s 45C(2) contemplates is between:
>
> (a) the effect on the environment which the original proposal as it has been implemented in fact (as distinct from the original proposal as it was contemplated under the assessment and authorisation procedure set out in s 40 and s 45) has had or will have; and
>
> (b) the effect on the environment which the relevant change or changes 'might' have.
>
> This is consistent with the Act operating in relation to a proposal and a change to an original proposal until it has been fully implemented, with the nature of a revised proposal, and with the Minister having power to approve of a change to an original proposal under s 45C(1) even though the proponent has commenced to implement it. My construction

> ensures that the regulatory provisions of the Act, including appropriate implementation conditions, apply to such a change.[70]

176 The applicant submitted that the only evaluation of the environmental impact of the original proposal was of the impacts as described in the Pluto Public Environmental Review and the report published by the EPA in 2007. The applicant submitted that it is evident from the Pluto Application and the Memorandum that the comparison was made against the environmental impacts as they were anticipated to occur before the construction, commissioning, or operation of the Pluto Project.

177 The applicant submitted that what should have happened is that the respondent should have considered the likely future effects of the original proposal, as it has been implemented, by considering, amongst other things, the actual effects which have been suffered. There was evidence that in the implementation of the proposal, greenhouse gases were being emitted at a higher rate than expected according to a greenhouse gas abatement program prepared by Woodside.[71] EPA Services were aware from reporting pursuant to the abatement program that, from at least 14 March 2019, annual CO2e emissions for the Pluto Proposal for the years 2014, 2015, 2016 and 2017 were higher than those estimated in the Emissions Management Program, and that, as at 17 December 2018, the Pluto Proposal had emitted approximately 1 million tonnes more CO2e than had been offset.[72]

178 The applicant submitted that while correspondence referring to the emissions reported by Woodside was provided to the respondent, there is no evidence that it was brought to his attention, or that it was considered by him and triggered the required comparison. There is no evidence that any comparison was performed of the environmental effect of the actual, reported annual CO2e emissions of the Pluto Proposal against those contemplated by the Pluto Application.

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[70] ***Elwood*** [117].

[71] The applicant relied on the correspondence, referred to earlier, in which Mr Zahra wrote to Woodside on 13 March 2019 regarding the discrepancy between the actual annual CO2e emissions reported by Woodside and the estimated average stated in the Pluto LNG Greenhouse Gas Abatement Program, and requested an assessment of whether the Woodside Pluto Carbon Offset Projects were anticipated to be sufficient to offset emissions over the life of the project: see AXS-17, 412. Mr Zahra forwarded the correspondence to advise the respondent in relation to the s 45C application by Woodside, with the comment, 'this request is mostly about a clarification of progress (not necessarily any non-compliance)': AXS-17, 409.

[72] The parties did not adduce evidence explaining the significance of the shortfall in offset. The letter from Mr Zahra to Woodside, dated 13 March 2019, requested information including whether offset projects were anticipated to be sufficient to offset emissions over the life of the project.

179 The applicant submitted failure to compare the actual impacts of the original proposal with those if it is changed was an error outside jurisdiction as the comparison was part of the evaluation required before the respondent could lawfully exercise of the power to approve a change without referring the revised proposal to the EPA under pt IV.

180 The applicant further submitted the error is material because, had the respondent undertaken the correct evaluation, there is a realistic possibility his decision could have been different because he would necessarily have had regard to information different from and in addition to that provided to him. In his oral submissions, senior counsel for the applicant submitted 'the fact that there is a difference between the impacts of the original proposal as it was originally anticipated and as it was implemented in fact ought to have required the chairman to ask for a more comprehensive analysis of the impacts of the proposal as implemented in fact'.[73] The submission, as I understand it, is that the comprehensive analysis was required because the respondent needed an analysis of the impact that the Pluto Proposal had in fact, if he was to evaluate what effect the processing of gas from other gas fields as part of that proposal might have on the environment.

The State's case

181 The State submitted that the court should be satisfied that the respondent did consider and evaluate the effect on the environment that the Pluto Proposal had in fact.

182 The State referred to sections in the Pluto Application, sections 2.3 and 2.4, which set out stage of implementation, including the time when commissioning began, offshore facilities commenced production, the time of first shipping, the changes to the original proposal which had already been approved, and the Five Year Performance Reports submitted in 2012 and 2017, and the Annual Environmental Compliance Reports from 2008 to 2017.

183 The State referred also to correspondence with Woodside by the EPA Services officers who assessed the Pluto Application. That correspondence was included in the hard copy file for the Pluto Application provided to the respondent by Mr Sutton.[74]

[73] ts 83, 86.
[74] Affidavit of Anthony Xavier Sutton affirmed 31 May 2021 [34]-[35], AXS-17.

184 The State referred to the evidence of Mr Sutton that, as part of talking the respondent generally through the Memorandum, he showed him the conditions in MS 757 that dealt with greenhouse gas emissions.

185 In effect, the State submitted that the court should infer that the respondent considered the relevant correspondence; alternatively, the evidence does not establish that he failed to do so and failed to consider the past effect of the Pluto Proposal.

186 The State further submitted that, having regard to the terms of s 45C(2), the extent to which the effects on the environment of the original proposal, in fact, are relevant, will depend on the circumstances, including whether implementation has commenced, the nature of the environmental effects, and the proposed changes. The State submitted that the effects the original proposal has had and will have in fact will be relevant only to the extent that they affect whether the proposed changes might have a significant detrimental effect in addition to or different from the effect of the original proposal.

187 The State submitted that, in the present case, the past effects of the Pluto Proposal on the environment were not relevant when regard is had to the nature of the changes proposed by Woodside.

Woodside's case

188 Woodside submitted that nothing in s 45C requires that the relevant comparison must be by reference to the effect on the environment which the original proposal as it has been implemented 'has had'. In the reasons of Buss JA in ***Elwood***, on which the applicant relied, his Honour spoke of the comparison between the effect on the environment which the original proposal as it has been implemented in fact (as distinct from the original proposal as it contemplated under the assessment and authorisation procedure) has had or will have, and the effect on the environment that the relevant change or changes might have.

189 His Honour's comments in ***Elwood*** were in a case where there was a significant difference between the original proposal and how it had been implemented in fact. Woodside submitted that there is no evidence in the present matter suggesting that, when the Pluto Application was before the respondent, there was any relevant difference between the original proposal as it was contemplated under the assessment and authorisation procedure, and the proposal as it had been implemented in fact.

190 Woodside further submitted that the applicant's reliance on the 'estimated average annual emissions' of CO2e was misplaced in fact. The estimate on which the applicant relied was from an estimate of reservoir emissions provided by Woodside in the Pluto LNG Project Greenhouse Gas Abatement Program. While the Abatement Program was required as a condition of implementation of the Pluto Proposal, the Abatement Program was approved on 20 July 2011, nearly four years after MS 757 was granted. Those estimates were not part of the original proposal or approval.

191 Woodside submitted that there is no material to show that estimates of annual greenhouse gas emissions from the Pluto Proposal were exceeded. Nor could there be any suggestion that the reservoir emissions amounted to any non-compliance.

192 Woodside submitted that any changes to the emissions envelope would have to be assessed and, if significant, approval sought. The s 45C application, when approved, did not authorise any emissions additional to those authorised by the original approval.

193 Woodside submitted, in the alternative, that if the respondent had erred, it was by deciding something which he was authorised to decide incorrectly, and the error was not jurisdictional.

194 Finally, Woodside submitted that, there being no evidence that greenhouse gas emissions from the Pluto LNG Plant were different from those in the proposal, the decision could not realistically have been different. It submitted that the applicant was asking the court to engage in speculation as to what material could have been placed before the respondent which could have led to a different decision.

Consideration

195 The issue raised by ground 1(c) is not whether the impact of the proposal on the environment was authorised by the approval, or whether the detrimental impact that the original proposal has had was compliant with conditions imposed. The questions raised by this ground are whether, in carrying out the comparison required by s 45C(2), the respondent was required to, and whether he did, evaluate the detriment to the environment of the greenhouse gas emissions produced by the Pluto Proposal as implemented.

196 The case presented by the applicant, as I understood it, was that the the respondent assessed the detrimental environmental effects of the

original proposal solely by reference to the expected detrimental environmental effects at the date of, and as described in, the Public Environmental Review and the 2007 Report.

197 I am not satisfied that the applicant has established an error in the application of s 45C(2).

198 First, for the reasons which I have given in relation to ground 1(a), I would not infer that the only information before the respondent and considered by him was that in the Memorandum and the decision documents provided by Mr Sutton. Nor would I infer that the respondent confined his consideration to the terms of the Memorandum. The Memorandum was, however, an important part of the information before the respondent who accepted the recommendation without amendment.

199 Second, s 45C requires the Minister (or delegate) to consider whether *the change or changes* to the proposal might have a significant detrimental effect in addition to or different from the effect of the original proposal. In appropriate cases, to evaluate the effect the changes might have it will be necessary to analyse the effects that the original proposal, as implemented in fact, has had or will have. I do not understand the reasons in ***Elwood***, however, as setting out measures which must be followed in every case for the lawful exercise of the power in s 45C. The six steps provide guidance to a decision maker under the Act, but do not supplant the terms of the section.

200 Third, the proposed changes in the Pluto Application included the source of gas that might in the future be processed at the Pluto LNG plant. The assessment, recorded in the table to the Memorandum, identified the detrimental effect on the environment of the original proposal. The proposed changes did not alter the annual production of LNG at the Pluto plant, or the estimated greenhouse gas emissions per tonne of LNG from the operation of the plant. The changes were assessed as 'minor and unlikely to cause consequence to the original proposal'; changes which 'can be adequately managed under the framework of conditions already set out in MS 757'. The changes were 'not considered to cause any [additional or different] detrimental effect'; no additional or different environmental effects were identified, and the changes were described as 'not of a scale or intensity to be significant'.[75]

[75] AXS-19, 468.

201 That characterisation followed an assessment by an officer of EPA Services, under the general supervision of Mr Sutton. I have set out the steps required by the Practitioner's Guide for making that assessment, earlier in these reasons.

202 There is no direct evidence of the assessment. But the application was received in December 2018, and the Memorandum signed on 28 June 2019. During the assessment, the officer who prepared the Memorandum was required to review the changes against the key characteristics of the original assessment and 'scan' them against 'the six aspects test'. The guide also provided for consideration of any necessary changes in conditions, and for compliance to be assessed. The officer received information about the audit of the Pluto LNG plant and the reporting of emissions.

203 Unless the characterisation of the nature of the changes can be challenged, the respondent (accepting the advice in the Memorandum) could properly consider that the changes might not have a significant detrimental effect on the environment that would not be adequately managed under existing conditions. If the changes might not themselves have a significant detrimental effect, the conclusion that they will not have a significant detrimental effect in addition to or different from the original proposal follows inevitably. The comparison which the applicant contended was necessary would not be required in order to properly form the opinion required by s 45C(2).

204 I am not satisfied error has been shown.

Ground 2

> The purported exercise of the discretion in s 45C(1) of the Environmental Protection Act 1986 by the respondent was beyond power because, on its proper construction, the duty in s 45C(2) requires the decision maker to assess the possible environmental effect of the proposed change or changes to the proposal against the same criteria as the original proposal, and the respondent did not do so in that he failed to identify and assess the environmental effects of the proposed changes to the proposal by reference to the total greenhouse gas emissions of the project despite the original proposal being so assessed.
>
> **Particulars of Ground 2**
>
> 1. By Bulletin 1259 dated 9 July 2007, the Environmental Protection Authority (EPA) assessed, reported on, and made recommendations to the Minister for the Environment in relation to, the Pluto LNG Development Proposal (Original Proposal).

2. The Original Proposal comprised facilities for the development of the Pluto gas field and the processing and export of gas from that field at facilities located on the Burrup Peninsula: Ministerial Statement 757, 'Proposal'.

3. The EPA assessed the Original Proposal against objectives which included:

    a. the minimising of greenhouse gas emissions in absolute terms; and

    b. the mitigating of greenhouse gas emissions: Bulletin 1259, p. 23.

4. The EPA recommended, relevantly as to greenhouse gas emissions:

    a. that the other party offset, for the life of the project, the reservoir CO2 emissions released: Bulletin 1259, p.24; and

    b. the imposition of a condition to address the abatement of greenhouse gases , being condition 12 of Appendix 4 to Bulletin 1259 (Condition 12).

5. The Minister imposed Condition 12 in Ministerial Statement No. 757 in terms identical to those recommended by the EPA.

6. Condition 12 requires the development of a Greenhouse Gas Abatement Program which, amongst other things, includes:

    a. The calculation of the greenhouse gas emissions associated with the proposal: Condition 12-1(1); and

    b. Specific measures to minimise the total net greenhouse gas emissions and/ or the greenhouse gas emissions per unit of product: Condition 12-1(2);

    c. A target for the progressive reduction of total net greenhouse gas emissions and/or greenhouse gas emissions per unit and as a percentage of total emissions over time and a program to achieve the target: Condition 12-1(7) & (8)

7. It is to be inferred from particulars 2-6 above that the EPA assessed the Original Proposal by reference to, inter alia, the total greenhouse gas emissions over the life of the project, being the life of the Pluto gas field.

8. By application dated 13 December 2018, the other party applied pursuant to s 45C of the Environmental Protection Act 1986

> (s 45C Application) for approval to change the Original Proposal to permit, inter alia, the processing of gas extracted from gas fields other than the Pluto gas field (gas field change).
>
> 9. A necessary consequence of the gas field change is that, if approved, the onshore facilities that formed part of the Original Proposal will process gas, and emit greenhouse gases, after the expiry of the Pluto gas field.
>
> 10. In purporting to approve the s 45C Application, the first respondent failed to assess the environmental impact of the total greenhouse gas emissions of the amended proposal in circumstances where the s 45C Application will necessarily increase those emissions due to the extended life of the Project.

The applicant's case

205 The applicant submitted that it is implicit in the comparison required by s 45C(2), as described by Buss JA in ***Elwood***, that the Chairman was required to assess the environmental effects that 'might' occur if the Pluto Application was granted against the same criteria that were applied in the assessment of the environmental effects of the Pluto Proposal under s 40.

206 The applicant contended that the EPA assessed the Original Pluto Proposal by reference to criteria including the total greenhouse gas emissions over the life of the project, being the life of the Pluto gas field. The applicant alleged that the respondent did not apply the same criteria to the Pluto Application, by failing to identify and assess the environmental effects of the proposed changes to the proposal by reference to the total greenhouse gas emissions.

207 The applicant's case was that a necessary consequence of the gas field change, if approved, was that the onshore facilities that formed part of the Original Proposal will process gas, and emit greenhouse gases, after the expiry of the Pluto gas field.

208 In purporting to approve the s 45C Application, the first respondent failed to assess the environmental impact of the total greenhouse gas emissions of the amended proposal in circumstances where the s 45C Application will necessarily increase those emissions due to the extended life of the Project.

The State's case

209 Section 44 of the Act requires the EPA to set out in its assessment report, following assessment of a proposal, what it considers to be the key environmental factors identified in the course of the assessment. The State submitted that there is nothing in the text of s 45C (or in s 40 or s 44), or in the reasoning of the Court of Appeal in ***Elwood***, that requires the Minister or delegate, when considering an application under s 45C, to assess the possible environmental effect of a proposed change against the same 'criteria' as were applied in the EPA's assessment of the original proposal.

210 The State submitted it would be pointless and inefficient to require assessment against criteria that were not relevant to the particular change proposed. The purpose of s 45C is to enable changes that will not have a significant additional or different detrimental impact to be dealt with quickly, and without a full environmental impact assessment.

211 In the alternative, the State submitted that the court should find that the respondent did assess the possible effects of Woodside's proposed changes against the same, or substantially the same, criteria for those applied by the EPA when assessing the Pluto Proposal in relation to greenhouse gas emissions. While the 2007 Report identified the objective of reducing total greenhouse gas emissions, the assessment in the 2007 Report was not based on a calculation of total greenhouse gas emissions based on a specified or estimated 'life of the project'. In particular, the report was not based on a life of the project based on or equated with the life of the Pluto gas field. To the extent the 2007 Report and the Public Environmental Review considered a life of the project, it was based on operational life or design life of the facilities including the gas processing plant.[76]

Woodside's case

212 Woodside submitted that the Pluto Proposal was never intended, and was not approved, to operate indefinitely, or by reference to the life of the Pluto gas field. It submitted that the Pluto Proposal, and the assessment and approval of it, were by reference to the Pluto gas field and associated offshore and onshore facilities which were anticipated to have a design life of up to 30 years. Woodside pointed to the reference to design life in the Public Environmental Review, although it accepted that MS 757 does not specify the design life of the plant.

[76] AXS-2, 25; AXS-3, 90 - 91, 112.

213 Woodside also pointed to references in the Public Environmental Review to its intention to develop other offshore reserves of gas and the potential to process gas from other fields through the Pluto LNG Plant.

214 Woodside submitted that the decision on the Pluto Application did not extend the life of the Pluto Proposal, because that remained limited to an operational or design life of up to 30 years.

215 Woodside further submitted that, in the Pluto Application, it did not seek an extension of the life of the Pluto LNG plant, and the approval under s 45C did not approve an extension.

216 Woodside submitted that the contention that the respondent was required to assess the environmental effects that might occur against the same criteria that were applied in the assessment of the Pluto Proposal is not found in s 45C, or in anything said in ***Elwood***. Section 45C is intended for minor amendments without a revised proposal being referred to the EPA for assessment under pt IV.

217 Woodside submitted that the contention by the applicant that the Pluto Proposal was assessed by reference to its total greenhouse gas emissions over the life of the Pluto gas field is not supported by the evidence. The 2007 Report and recommendation do not say that was done and do not include calculation of total greenhouse emissions.

Consideration

218 To establish ground 2, the applicant must show that on the proper construction of s 45C, the criteria used in assessing the original proposal must be used in assessing any proposed change. Further, the applicant must show, as a fact, that the total greenhouse gas emissions over the life of the project was the criterion used in the original assessment.

219 Dealing first with the factual question, the original proposal was not assessed by reference to total greenhouse gas emissions over the life of the proposal, or on the basis that the operational life of the plant was the life of the Pluto gas field. Consistently, the assessment in the Public Environmental Review and the 2007 Report is by reference to emissions on an annual basis and emissions per unit of product. To the extent that the Public Environmental Review considered total emissions, it was an averaging over the first 20 years.[77] The fact that the abatement and offset conditions were to be implemented for the life

[77] AXS-3, 127.

of the project does not indicate that emissions were assessed on that basis.

220 The Memorandum, and the Table setting out assessment of the proposed changes, identified the detrimental effect on the environment of the original proposal by reference to greenhouse gas emissions estimated on an annual basis.[78] That method of assessment is consistent with the Public Environmental Review and the 2007 report.

221 Second, in my opinion, s 45C does not require the Minister to assess a change to a proposal in a particular way. The proposed change must be related to or connected with the subject matter of the original proposal for it to be a 'revised proposal' under s 45C(1).[79] But the section says nothing about how the respondent must assess the effect on the environment that might result. The disclosed intention of the section is to permit change during the implementation of a proposal without a revised proposal being referred for assessment under pt IV. There is no equivalent to s 44, requiring an assessment report which sets out the key environmental factors identified in the assessment.

222 Section 45C(2) limits when approval may be given under s 45C(1), and requires the decision-maker to consider the detrimental effect on the environment that the changes to the proposal might have. It does not, expressly or impliedly, specify the criteria to be used in assessing what might be the effect of the change.

223 In considering this ground, it is not necessary to decide whether the use of particular criteria or environmental factors, if in error, would be within jurisdiction.

224 I am not satisfied that ground 2 has been established.

Delay and discretion

225 The application for judicial review was brought pursuant to O 56 of the *Rules of the Supreme Court 1971* (WA). Where an application is made outside the period of six months after the later of the date on which a reviewable decision was made or reviewable conduct occurred, or the date on which an applicant became aware of it, the applicant requires leave to proceed. The court may give or refuse leave.[80]

[78] AXS-19, 466.
[79] ***Elwood*** [103].
[80] O 56 r 5(2)(a).

226 The Pluto Decision was made on 1 July 2019. The applicant became aware of the decision on 2 July 2019. It acted immediately and requested documents from the Department.

227 On 20 August 2019, the applicant lodged applications under the *Freedom of Information Act 1992* (WA) for documents relating to this decision and the NWS Decision.

228 The following further facts relating to the delay in commencing proceedings are agreed in the statement of agreed facts:

> 27. The original deadline for the release of the documents under the FOI Act was 1 October 2019. All were extended by Department of Water and Environment and Department of Premier and Cabinet Department of Water and Environment.
>
> 28. On 18 October 2019, DPC informed the applicant's solicitors that it held no relevant documents.
>
> 29. On 11 November 2019, the applicant's solicitors received an email from Department of Water and Environment containing a web link to the documents found to be within the scope of the applicant's *Freedom of Information Act* application.
>
> 30. On or about 18 November 2019, and informed by the documents received from Department of Water and Environment on 11 November 2019, the applicant's solicitors completed the preparation of the documentation required for a referral pursuant to s 38 of the Environmental Protection Act.
>
> 31. On 18 November 2019, the applicant lodged the s 38 referral.
>
> 32. On 28 November 2019, the EPA acknowledged receipt of the s 38 referral.
>
> 33. Between 28 November 2019 and 9 November 2020, there was correspondence between various of the applicant (and its solicitors), the EPA and the Other Party.
>
> 34. By letter dated 22 January 2020 from the applicant to the Respondent and by letter dated 24 January 2020 from the applicant's solicitors to the Other Party, the applicant acknowledged the limitation period for any application for judicial review of the Pluto Decision.
>
> 35. As of 22 January 2020 at the latest, the applicant had engaged solicitors and senior counsel to advise it in relation to seeking leave from the Supreme Court of Western Australia to make an application for judicial review in relation to the Pluto Decision.

> 36. On 24 January 2020, there was a meeting between the applicant, EPA and Department of Water and Environment in which the status of the EPA's consideration of whether the s 38 referral was valid was discussed.
>
> 37. On 24 January 2020, the applicant's solicitors notified the Other Party, the Respondent and the Minister, inter alia, that while the applicant understood an assessment of the s 38 referral would not be made before the limitation period expired for the making an application for judicial review, the applicant reserved its right to make that application in the future.
>
> 38. On 9 November 2020, the EPA informed the applicant that it did not consider the s 38 referral to be valid.
>
> 39. On 27 November 2020, the applicant's solicitors gave notice to the Minister, the Respondent and the Other Party that the applicant intended to apply for judicial review of the Pluto Decision, and invited the Minister to revoke the Pluto Decision.
>
> 40. By letter dated 9 December 2020, received by the applicant's solicitors on 10 December 2020, the Minister advised the applicant that the Respondent had not revoked the Pluto Decision or treated it as invalid, and that the Minister did not propose to intervene.

229 Proceedings were commenced over 17 months after the applicant became aware of the decision and 11 months after the limitation period expired.

230 The referral under s 38 was raised in a letter from the applicant to the respondent on 27 September 2019, before the applicant obtained access to relevant documents under its Freedom of Information request.[81] The applicant referred, in particular, to its concerns that the Burrup Hub project had been fragmented into individual proposals which did not account for aggregate and cumulative impacts and did not allow a strategic approach to be taken.

The applicant's submissions

231 The applicant explained the reason for delay by reference to the following factors:

(1) waiting for the Department to comply with applications under the *Freedom of Information Act 1992*;

[81] TJM-10, 102.

(2) waiting for the EPA to respond to the applicant's submission that it should retract the respondent's decision; and

(3) waiting for the EPA to assess (or refuse) the s 38 referral.

232 The applicant submitted that its s 38 referral sought the EPA to assess the environmental suitability of the Burrup Hub proposal as a whole. While that referral would not nullify the NWS Decision, the EPA would have been entitled to enquire into and report on the implementation of MS 536 and that may have resulted in the imposition of different conditions.

233 The applicant submitted that the EPA was required by s 39A to resolve whether or not to assess the s 38 referral within 28 days, but in fact took almost 12 months to determine not to assess it. The applicant said that it commenced proceedings shortly after being advised of that decision.

234 The applicant submitted that it is reasonable for the court to infer that the delay would have been less had the EPA more quickly decided that it would not assess the s 38 referral.

235 The applicant further submitted that the concurrent request for the respondent to revoke its decision as invalid was also considered by the EPA over several months, and again it is a reasonable inference that it delayed the commencement of proceedings.

236 The applicant submitted that it acted at all times in good faith, attempting to resolve the issues by means other than the commencement of proceedings. It further submitted that the EPA and Woodside were aware of and participated in the non-curial challenge to the NWS decision.

237 The applicant submitted that there was no evidence that Woodside suffered prejudice simply as a consequence of the delay in filing.

The State's submissions

238 The State described the delay in bringing proceedings as significant, and submitted that the limitation period should be rigidly applied in all but exceptional cases.

239 The State further submitted that the Pluto Decision was granted for the benefit of Woodside, and the applicant was under a heavier duty to

act expeditiously because the challenge had implications for other people.

240 The State submitted that the applicant elected not to commence judicial review proceedings within the limitation period but chose to pursue other measures. The State further submitted that the alternative measures chosen were not apt to achieve the relief which the applicant now seeks. Specifically, the State submitted that the invitation to the EPA to retract the decision could not be effective, as the decision was made by the respondent in his capacity as the delegate of the Minister. The EPA has no powers under s 45C, and no power to retract the decision.

241 The State further submitted that the s 38 referral does not constitute an adequate explanation for delay when it could not have been treated as a valid referral, and when there was nothing to prevent the applicant from pursuing the s 38 referral and at the same time commencing proceedings to review the decision.

The Woodside submissions

242 Woodside submitted that the application for leave should be refused because of the extent of the following factors:

(1) the extent of the delay;

(2) there was nothing to prevent the applicant commencing proceedings within the limitation period;

(3) the applicant, with full knowledge of the limitation period, made a conscious decision not to commence proceedings without conferring with the respondent or the other party, and thereby reserved exclusively to itself when the proceedings would be commenced;

(4) Woodside will suffer significant prejudice if the Pluto Decision is quashed;

(5) other third parties' rights and interests are also likely to be affected, including the rights and interests of joint venture participants and the other parties to contracts;

(6) the other solutions pursued by the applicant did not preclude it from also commencing judicial review proceedings and those alternative solutions were highly speculative and unrealistic.

Consideration

243 The general principle is that the discretion to extend time is given for the purpose of enabling the court to do justice between the parties, thereby ensuring that the time limitation does not become an instrument of injustice.[82] Where the application is for a prerogative writ or similar remedy challenging the efficacy of the acts or decisions of a public body or official, there is a public interest in finality. In the case of a long delay between the decision challenged and the institution of proceedings, ordinary principles require an applicant to establish that its case is exceptional.[83]

244 I agree with the observations of Doyle CJ in ***Hall v City of Burnside***:

> As McHugh J said in ***Brisbane South Regional Health Authority v Taylor*** (1996) 186 CLR 541 at 553, the six month limitation period is 'the general rule'. It is not 'an arbitrary cut off point'. The six month limit represents a judgment as to an appropriate time limit having regard to the public interest and having regard to the interest of individuals who have an interest in the particular case that arises. A limitation period is imposed, and the length of the period is determined, recognising that the limitation period may result in a cause of action being defeated.
>
> A six month time limit for proceedings by way of judicial review is common in Australia, and in some jurisdictions the time limit is even shorter: see Aronson, Dyer, Groves, *Judicial Review of Administration Action* (3rd ed, Lawbook Co, 2004), pp 718-719.
>
> The relatively short limitation period reflects the fact that judicial review is concerned with the validity of decision making by individuals and bodies exercising statutory and other powers that must be exercised in the public interest. Such decisions often have direct and consequential effects on persons other than those immediately affected. In a range of circumstances it will often be a matter of significance for other persons and authorities to know whether or not such a decision is valid or has been subject to a legal challenge. There is a substantial public interest in being able to say, after a specified time, that such a decision can be treated as beyond attack. The very fact that the standing rules permit challenges to validity to be made by persons other than those directly involved in the decision making process is a reason

[82] ***Gallow v The Honourable Justice Dawson*** [1990] HCA 30; (1990) 64 ALJR 458.

[83] ***Re Commonwealth of Australia; Ex parte Marks*** [2000] HCA 67; (2000) 75 ALJR 470 [15] - [16]; see also ***Vella v Minister for Immigration and Border Protection*** [2015] HCA 42; 326 ALR 391 [3].

> why there should be a relatively short period within which any such attack should be mounted.[84]

245 The applicant submitted, in effect, that the reasons for the delay make this an exceptional case.

246 The applicant relied on comments I made in ***Pennock v City of Busselton***,[85] where I said that I would be prepared to excuse delay where the applicant was pursuing other possible means of challenging a development approval on land adjacent to land he owned. That case turned on its facts. The relevant period of delay was about seven weeks between when the applicant became aware of a planning decision and when the City advised him that it could not revoke the approval. During that period the City had said it would conduct an independent review into the development application. The applicant's evidence was that he was not aware that he could seek judicial review or aware of the limitation period before he was told that the approval could not be revoked.

247 In ***Re City of Perth; Ex parte Lord***, to which the applicant also referred, the question of delay arose in unusual circumstances. The applicant sought to challenge a development approval given on 11 December 2001.[86] Proceedings to challenge that approval were brought well within the limitation period. The applicant also brought proceedings in relation to an earlier approval, given on 13 February 2001. He only commenced that action when it was submitted that it would be futile to quash the later approval because the earlier would be in force. The court said the delay in challenging the earlier approval was explicable when the City of Perth had itself considered that approval to be invalid and had dealt with the applicant on that basis.

248 These cases illustrate that the principles governing an application to extend time cannot be applied mechanically, and it is necessary to have regard to the particular circumstances of each case.

249 I take into account that the applicant received no final decision on its attempt to refer the whole Burrup Hub proposal, or its submission that the Pluto Decision should be revoked as invalid, until November 2020. I also take into account that, during 2020, the EPA gave the applicant and Woodside the opportunity to comment on the applicant's proposals. While the applicant did not receive a final decision on its

[84] ***Hall v City of Burnside*** [2006] SASC 283 [47] - [49].
[85] ***Pennock v City of Busselton*** [2021] WASC 29 [39] - [49].
[86] ***Re City of Perth; Ex parte Lord*** [2002] WASCA 254, [108] - [109].

proposals, the correspondence contains no acknowledgement by the respondent that they might succeed.

250 In the present case, I am not satisfied that there is any sufficient justification for such a long delay.

251 First, the applicant's letters of 22 and 24 January 2020 show that it was aware that a decision whether there would be an assessment of its purported referral under s 38 would not be made before expiry of the limitation period.[87]

252 Second, the Pluto Decision affected other parties, including contractual parties and joint venture participants. Where a decision might affect the interests of other parties, an applicant may be regarded as under a heavier duty to act expeditiously.[88]

253 Third, the applicant was aware of the effect of the delay on Woodside and must have known it would affect others. In a letter dated 21 February 2020, the applicant stated the possibility of it seeking leave to apply for judicial review 'in the coming weeks' and noted the 'potentially imminent nature of the activities purported to be authorised by the 45C Decisions'.[89]

254 Fourth, by a letter dated 23 June 2020, a copy of which was provided to the applicant, Woodside clearly expressed its position that it was entitled to treat the approval as valid, and that it acted in reliance on the approval and continued to do so. Woodside wrote that if the applicant considered the approval to be invalid, 'it should promptly make its case clear and seek a Court ruling to that effect'.[90] The applicant did not bring proceedings for over five months after that letter.

255 The applicant's decision to pursue alternative remedies, particularly by means that would not involve the expense of court proceedings, is understandable. But the interests of justice and not met by accepting a course determined solely by the applicant, and discounting the public interest in finality of decisions and the interests of all parties affected. Given the potential prejudice to Woodside and others, of which the applicant must have been aware, its explanation for such a long delay is not sufficient. There was nothing that prevented

[87] TJM-18, 146 - 147.
[88] ***Hunter Valley Developments Pty Ltd v Cohen*** [1984] FCA 176; (1984) 3 FCR 344, 349.
[89] TJM-21, 152 - 157.
[90] Macknay, 169.

the applicant from commencing this action, even if it wished to pursue other options. Had the applicant commenced proceedings, the court, guided by the submissions of the parties, could have exercised control over progress.

256 In my opinion, the delay in this case is properly characterised as excessive and unwarrantable, and is itself a sufficient reason to exercise the discretion against the grant of leave.

257 I will, however, briefly comment on the issue of prejudice.

258 Because the applicant only brought its proceedings so late, Woodside relied on prejudice that arises because the proceedings were not commenced earlier. Woodside relied, first, on the prejudice from its development approval being put at risk when, unless leave is given, it was safe from attack. Second, it adduced evidence of decisions and actions it had taken on the basis that it had regulatory approval. Third, Woodside referred to potential prejudice should it be unable to comply with obligations it has incurred under various agreements.

259 The evidence to support these submissions was received, without objection by any party, as confidential. It is difficult to fully address prejudice in these reasons without straying into matters that were received on a restricted basis.

260 Because I would dismiss this action on its merits, I will simply indicate the basis upon which I find that Woodside, and potentially third parties, would suffer significant prejudice were leave given.

261 Woodside adduced uncontested evidence that it and other parties, including joint venture participants, have made decisions, investments, and commitments on the strength of the Pluto Decision. Those matters are set out in pars 73 and 79 of Woodside submissions, and a detailed Schedule of affected projects.

262 The submissions were supported by the following materials, to which I have had regard. The source material was restricted for reasons of commercial confidentiality:

(1) the Statement of Agreed Facts in Relation to Prejudice dated 29 September 2021 (a restricted document); and

(2) the following affidavits:

(a) affidavits of Linda Evelyn Lim Chappell affirmed 8 September 2021 and 8 November 2021;

(b) the affidavit of Charles Philip Blaxill, sworn 3 December 2021, and the confidential affidavit of Mr Blaxill sworn 29 September 2021;

(c) affidavits of Michael Kenneth Gibson affirmed 8 September 2021 and 8 November 2021.

263 Some of the work in the projects referred to preceded the Pluto Approval. Decisions were made, either with knowledge that the applicant might commence proceedings, or after this action was commenced. That does not lessen the prejudice that would be suffered were an approval given in July 2019 now set aside.

Conclusion

264 The application for leave to proceed is refused pursuant to O 56 r 5.

265 The application for review is dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

TB
Associate to the Honourable Justice Allanson

1 MARCH 2022